No. 05-465

Title:	Mohawk Industries, Inc., Petitioner v. Shirley Williams, et al.
Docketed:	October 12, 2005
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(04-13740)
Decision Date:	June 9, 2005
Rehearing Denied:	August 8, 2005

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 7 2005	Petition for a writ of certiorari filed. (Response due November 14, 2005)
Nov 9 2005	Brief of respondents Shirley Williams, et al. in opposition filed.
Nov 21 2005	Reply of petitioner Mohawk Industries, Inc. filed. (Distributed)
Nov 22 2005	DISTRIBUTED for Conference of December 9, 2005.
Dec 12 2005	Petition GRANTED limited to Question 1 presented by the petition.
Jan 23 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jan 24 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including February 2, 2006.
Jan 25 2006	Consent to the filing of amicus briefs in support if either party received from counsel for the respondents.
Feb 2 2006	Brief amici curiae of National Association of Manufacturers, et al. filed.
Feb 2 2006	Joint appendix filed.
Feb 2 2006	Brief of petitioner Mohawk Industries, Inc. filed.
Feb 2 2006	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Feb 24 2006	Extension of time within which to file respondents' brief on the merits to and including March 16, 2006.
Mar 6 2006	SET FOR ARGUMENT on Wednesday, April 26, 2006.
Mar 14 2006	Brief amicus curiae of Immigration Political Action Committee, U.S., Inc., et al filed.
Mar 14 2006	Brief amicus curiae of National Association of Shareholder and Consumer Attorneys filed.
Mar 16 2006	Brief amicus curiae of United States filed. (Distributed)
Mar 16 2006	Brief of respondents Shirley Williams, et al. filed. (Distributed)
Mar 17 2006	CIRCULATED.
Mar 17 2006	Motion of the Solicitor General for leave to participate in oral argument as

	amicus curiae and for divided argument filed.
Mar 20 2006	Record received from U.S.C.A. 11th Circuit. (1 envelope)
Mar 21 2006	Record received from U.S.D.C. Northern District of Georgia. (1 box)
Apr 3 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 5 2006	Motion DISTRIBUTED for Conference of April 21, 2006.
Apr 11 2006	Reply of petitioner Mohawk Industries, Inc. filed. (Distributed)
Apr 26 2006	Argued. For petitioner: Carter G. Phillips, Washington, D.C. For respondents: Howard W. Foster, Chicago, Ill.; and Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supre rt, U.S.
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05-465 OCT 7 - 2005

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No. 05-

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 7, 2005

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QUESTIONS PRESENTED

1. Whether a defendant corporation and its agents can constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some larger enterprise and not just its own affairs.

2. Whether plaintiffs state proximately caused injuries to business or property by alleging that the hourly wages they voluntarily accepted were too low.

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption above.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioner Mohawk Industries, Inc. states that there is no parent corporation or publicly held corporation that owns 10% or more of Mohawk Industries, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mohawk Industries, Inc. ("Mohawk") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the district court denying in part and granting in part petitioner's motion to dismiss was reported at 314 F. Supp. 2d 1333 (N.D. Ga. 2004) and is reproduced in the appendix (Pet. App.) at 24a-61a. The order of the district court certifying the case for interlocutory appeal was unpublished and is reproduced in the appendix at Pet. App. 68a-72a. The order of the Eleventh Circuit granting Mohawk's petition for interlocutory appeal was unpublished and is reproduced in the appendix at Pet. App. 67a. The opinion of the court of appeals affirming in part and reversing in part the district court's order was published at 411 F.3d 1252 (11th Cir. 2005) and is reproduced at Pet. App. 1a-23a. The order of the court of appeals denying rehearing en banc was unpublished and is reproduced at Pet. App. 73a. The order of the district court staying discovery pending this Court's review was unpublished and is reproduced in the appendix at Pet. App. 62a-66a.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2005. An order denying petitioner's petition for rehearing en banc was entered on August 8, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1961(4) of Title 18 to the United States Code provides that:

> [As used in this chapter,] "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .

Section 1962(c) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1964(c) of Title 18 to the United States Code provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

This petition arises out of a suit by a putative class of current and former hourly employees of Mohawk who allege that Mohawk hired illegal immigrants and thereby suppressed the wages that plaintiffs were offered and voluntarily accepted. The Eleventh Circuit's decision, which permits this theory of liability under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") to proceed, concededly conflicts with those of other circuits and presents two significant questions concerning the statute.

The first question is whether a defendant corporation can conduct or participate in the affairs of a distinct RICO "enterprise" under 18 U.S.C. § 1962(c) where the only members of the putative "enterprise" are the corporation and its agents. The Eleventh Circuit's affirmative answer to this question exacerbated a sharp split in the courts of appeals (now two to three) on whether a corporate defendant and its agents can constitute a RICO enterprise. The Eleventh Circuit candidly acknowledged that its decision "puts our circuit in conflict" with the Seventh Circuit's construction of the enterprise requirement in a materially indistinguishable case. Pet. App. 9a. Indeed, the Eleventh Circuit's decision also conflicts with the holdings of the Second and Third Circuits, while being in accord with that of the Sixth.

The Eleventh Circuit's ruling impermissibly relaxes the limitations Congress placed on the imposition of RICO's harsh penalties. Section 1962(c)'s requirement that a defendant participate in the operation or management of an "enterprise" that is different from the defendant alone is a "critical limitation" on RICO that prevents it from becoming a routine vehicle for imposing civil liability. *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993). Corporations are artificial entities that function only through agents working on their behalf. Yet, the Eleventh Circuit held that a corporation may be a RICO defendant whenever it uses such persons to

perform a corporate function (as all corporations must). Under the Eleventh Circuit's reading of the statute, the requirements that there be a RICO "enterprise" separate from the RICO defendant and that the defendant conduct the *enterprise's* affairs, not merely its own, are no limitations at all when a corporation is a RICO defendant.

The second question meriting this Court's review is whether plaintiffs have properly alleged proximately caused harm to their "business or property," as required under 18 U.S.C. § 1964(c). Plaintiffs allege that they voluntarily accepted the assertedly depressed wages. The Eleventh Circuit's acceptance of plaintiffs' alleged injury to their "business or property" fails to recognize these terms as "words of limitation" on the scope of civil RICO actions. *Doe* v. *Roe*, 958 F.2d 763, 767 (7th Cir. 1992). The Eleventh Circuit's improper expansion of RICO to permit plaintiffs to sue for a retroactive wage increase from voluntarily agreed upon wages is also in direct tension with decisions of both the Fifth Circuit and the D.C. Circuit.

Furthermore, the Eleventh Circuit's conclusion that plaintiffs need not plead the predicate facts to establish proximately caused injury is in conflict with this Court's opinion of last term *Dura Pharmaceuticals, Inc.* v. *Broudo*, 125 S. Ct. 1627, 1634 (2005). In that case, this Court held that conclusory allegations of proximate cause were insufficient and that plaintiffs must separately allege facts establishing the causal steps in their theory of injury. *Id.* Furthermore, plaintiffs' conclusory allegations demonstrated no direct injury, in contravention of this Court's opinion in *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which forbids those with attenuated injuries from recovering under RICO.

The Eleventh Circuit's decision to permit plaintiffs to proceed despite these manifest defects in their complaint warrants this Court's attention. The circuit court's construction of RICO's enterprise requirement—if left

intact—will transform routine corporate conduct into conduct actionable under RICO. Moreover, the circuit court's dramatic relaxation of the requirement that plaintiffs plead a proximately caused injury to their business or property transforms the RICO private right of action from a narrowly drawn remedy, focused on providing redress to the direct victims of crime, into a device that uses *in terrorem* remedies to extort windfall recoveries for parties with self-professed "injuries."

1. On January 6, 2004, the respondents filed a complaint in the United States District Court for the Northern District of Georgia on behalf of a purported class of current and former hourly employees of petitioner Mohawk. Pet. App. 24a-25a; Compl. Mohawk was the only named defendant. Mohawk (and its subsidiaries) is a leading manufacturer of carpet, rugs, tile, and other floor coverings. Plaintiffs asserted a federal RICO claim under 18 U.S.C. § 1962(c), two claims under Georgia's RICO statute (Ga. Code Ann. § 16-14-4), and a claim for unjust enrichment. All of these claims stemmed from plaintiffs' allegation that Mohawk had knowingly employed illegal aliens and that this employment of illegal workers somehow depressed wages for all of Mohawk's legal hourly workers throughout the State of Georgia.[1] See Pet. App. 25a-28a; Compl. ¶¶ 14-31.[2]

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[1] While the allegations in the Complaint must be taken as true at this stage, Fed. R. Civ. Proc. 12(b)(6), Mohawk vigorously denies any illegal conduct.

[2] The Complaint set forth five alleged RICO predicate acts: (1) knowingly hiring more than 10 illegal aliens during a 12-month period, in violation of 8 U.S.C. § 1324(a)(3)(A); (2) harboring illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii); (3) encouraging illegal aliens to enter the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv); (4) accepting false identification documents, in violation of 18 U.S.C. § 1546(a); and (5) using false identification documents, in violation of 18 U.S.C. § 1546(b). *See* 18 U.S.C. § 1961(1)(B), (F) (providing that violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 constitute "racketeering activity" for RICO purposes).

Plaintiffs' allegations almost exclusively focused upon Mohawk and its employees—not on an alleged RICO enterprise. Specifically, plaintiffs alleged: "Mohawk has accepted for employment . . . workers that it knew or had reason to know were not authorized to work in the United States"; "Mohawk has knowingly and recklessly accepted" obviously false documentation for employees; "Mohawk supervisors have encouraged . . . employees to . . . [illegally] reapply for work at Mohawk"; "Mohawk employees and/or supervisors have destroyed eligibility documents" to conceal Mohawk's employment of illegal workers; "Mohawk employees have traveled to the United States border . . . to recruit undocumented aliens"; and that "Mohawk employees and supervisors have assisted illegal workers in attempting to evade detection by law enforcement." Compl. ¶¶ 15-18, 20, 22, 28; see Pet. App. 25a-27a.

In an attempt to satisfy § 1962(c)'s requirement that the defendant conduct the affairs of an "enterprise" (and not just its own affairs), plaintiffs alleged in their complaint that Mohawk had participated in "an association-in-fact enterprise with third party employment agencies and other recruiters." Compl. ¶ 76; Pet. App. 45a. In particular, plaintiffs alleged that these third-party recruiters supplied illegal workers to Mohawk and that Mohawk paid the recruiters a fee for each worker they supplied. See Compl. ¶ 76; Pet. App. 45a. Plaintiffs asserted without explanation that Mohawk participated in the operation and management of the affairs of this "enterprise," and claimed that the "common purpose" of the enterprise was to "obtai[n] illegal workers for employment by Mohawk." Compl. ¶¶ 77, 78. Plaintiffs further asserted that the enterprise "exists for Mohawk's benefit." *Id.* ¶ 78. Plaintiffs did not name any participants in this supposed "enterprise" other than Mohawk and its employment recruiters.

Plaintiffs also asserted that they had standing to sue under RICO for a retroactive wage increase because Mohawk's

hiring of illegal workers had depressed plaintiffs' wages and thereby "injured [their] business or property." Compl. ¶¶ 85-87; 18 U.S.C. § 1964(c). Plaintiffs' only support for this claim was a conclusory assertion that Mohawk's knowing employment of illegal workers had "substantially and unlawfully increased the supply of workers" and that this "unlawful expansion of the labor pool" allowed Mohawk to depress the wages it paid to other hourly employees throughout the State of Georgia. Compl. ¶ 35. The complaint offered no explanation for how Mohawk could pay below-market wages and retain its workforce, nor did it claim that Mohawk had sufficient market power to depress wages throughout Georgia. Instead, plaintiffs merely alleged generally that Mohawk's employment of "hundreds" of illegal aliens somehow depressed the wages of the millions of workers in Georgia. *Id.* ¶ 61.

2. Mohawk moved to dismiss all four counts of the complaint, arguing *inter alia* that respondents had failed to plead a sufficient RICO enterprise and that they had not adequately pled proximate cause (a requirement for both federal and Georgia RICO, see 18 U.S.C. § 1964(c); Ga. Code Ann. § 16-14-6(c)). The district court denied Mohawk's motion to dismiss the federal and Georgia RICO claims.[3] Pet. App. 61a. The district court, however, granted Mohawk's motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed discovery pending resolution of the appeal. *Id.* at 72a. The court found that there was "substantial ground for difference of opinion" both as to whether plaintiffs had pled an adequate RICO enterprise and as to whether they had pled sufficient proximate cause, and concluded that each question merited immediate review. *Id.* at 70a. Indeed, the court noted that its opinion conflicted

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[3] The district court partially granted Mohawk's motion to dismiss the unjust enrichment claim, dismissing plaintiffs' claim for unjust enrichment based on Mohawk's supposed benefit from workers' compensation savings. Pet. App. 61a.

with the Seventh Circuit's opinion in *Baker* v. *IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004). See Pet. App. 70a. The Eleventh Circuit then granted Mohawk's petition to appeal. *Id.* at 67a.

3. The Eleventh Circuit affirmed the district court's denial of Mohawk's motion to dismiss the federal and Georgia RICO claims.[4] Pet. App. 23a. The Eleventh Circuit held that a plaintiff could survive a motion to dismiss by alleging an "enterprise" that consisted of any "loose or informal association of distinct entities." *Id.* at 7a (internal quotation marks omitted). Because Mohawk and the third-party recruiters allegedly were "distinct entities . . . engaged in a conspiracy to bring illegal workers into the country for Mohawk's benefit," the Eleventh Circuit concluded that they constituted a RICO enterprise. *Id.* at 7a-8a. The court further held that the alleged enterprise had a "common purpose" because all the participants stood to gain financial benefits, and that the plaintiffs' general allegation that "Mohawk participates in the operation and management of the affairs of the enterprise" was sufficient to plead operation or management. *Id.* at 8a (internal quotation marks omitted).

The Eleventh Circuit expressly acknowledged that its enterprise holding "puts our circuit in conflict with the Seventh Circuit's decision in *Baker v. IBP, Inc.*" Pet. App. 9a. The *Baker* plaintiffs made allegations materially identical to the allegations made by respondents—that a defendant corporation was violating immigration laws by employing illegal aliens—and, like plaintiffs here, claimed that the RICO enterprise consisted of the defendant corporation and third parties that provided it with employees. See *Baker*, 357 F.3d at 686-87; *infra* at note 16. In an opinion for the court,

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[4] The Eleventh Circuit reversed the district court's judgment on the unjust enrichment claims in part, holding that plaintiffs' unjust enrichment claim should have been dismissed in its entirety because plaintiffs contracted for the wages they received. Pet. App. 23a.

written by Judge Easterbrook, the Seventh Circuit held that the *Baker* plaintiffs had failed to allege that IBP was operating or managing a separate enterprise (as opposed to "operat[ing] *itself* unlawfully"). See *Baker*, 357 F.3d at 691. The Eleventh Circuit rejected the Seventh Circuit's analysis, claiming that it was "possible" for plaintiffs to establish that Mohawk operated or managed the supposed "enterprise" of Mohawk and its recruiters. Pet. App. 11a. The Eleventh Circuit did not explain how this could be "possible" or how Mohawk's hiring of its own employees constituted the operation or management of the affairs of a distinct enterprise—as opposed to Mohawk's own affairs. The Eleventh Circuit also noted that it disagreed with the Seventh Circuit on the need for all the participants in the enterprise to have the same "common purpose," reasoning that "the 'common purpose' of the enterprise [need not] be the sole purpose of each and every member of the enterprise." *Id.* at 10a.[5]

The Eleventh Circuit also concluded that plaintiffs' allegedly depressed wages was a "business" injury that was adequate for RICO standing. Pet. App. 11a-12a. Relying on

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[5] In holding that plaintiffs had alleged an enterprise, the Eleventh Circuit purported to rely on three circuit court cases that it claimed had approved "similar" allegations. Pet. App. 9a (citing *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004), *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), and *Commercial Cleaning Servs., LLC* v. *Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001)). But none of these cases held that an association between a corporation and those acting on its behalf could satisfy § 1962(c)'s enterprise requirement. Neither *Commercial Cleaning Services* nor *Trollinger* even addressed the enterprise requirement. *See Trollinger*, 370 F.3d at 622 ("[W]e do not express an opinion as to whether plaintiffs can show that Tyson and its co-conspirators constituted an 'enterprise'"); *see Commercial Cleaning Servs.*, 271 F.3d at 380-85. *Mendoza* addressed an entirely different alleged enterprise, one involving multiple defendant corporations that, in concert, conspired to use an employment agency as a "front company" to shield the defendants from liability for employing illegal workers. 301 F.3d at 1167 (internal quotation marks omitted).

the Ninth Circuit's analysis in *Mendoza*, the Eleventh Circuit held that plaintiffs' alleged "'legal entitlement to business relations unhampered by [the alleged RICO predicate acts]'" was a business interest that gave the plaintiffs standing under § 1964(c). *Id.* at 12a (quoting *Mendoza*, 301 F.3d at 1168 n.4). The court further held that the plaintiffs' alleged injury was sufficiently "direct" to give them standing to sue under RICO and that plaintiffs' conclusory allegations that Mohawk's hiring of illegal workers had increased the labor supply and depressed wages were "all that is needed" to state proximate cause. *Id.* at 14a.

Mohawk filed a petition for rehearing en banc, which was denied. Pet. App. 73a. The district court has stayed all proceedings pending this Court's review. See *id.* at 65a (noting that this Court "very well may choose to grant certiorari" in light of the "substantial ground for difference of opinion" as to both the RICO enterprise issue and the proximate cause issue).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER A DEFENDANT CORPORATION AND ITS AGENTS ACTING ON ITS BEHALF CAN TOGETHER CONSTITUTE A DISTINCT RICO ENTERPRISE.

This case presents the question whether a corporate defendant can conduct or participate in the affairs of a RICO "enterprise" comprised solely of the corporation and its agents performing corporate tasks for it. See 18 U.S.C. § 1962(c). The Eleventh Circuit's affirmative answer to this question parallels the holding of the Sixth Circuit. These decisions, however, are in fundamental conflict with the conclusions of the Second, Third, and Seventh Circuits. Indeed, the Eleventh Circuit itself acknowledged that its decision that a manufacturer and its employment recruiters

could comprise an enterprise "puts our circuit in conflict" with the Seventh Circuit's construction of the enterprise requirement in a materially identical case. Pet. App. 9a. That is reason enough for this Court to grant certiorari.

Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The statute contemplates "two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161 (2001). Plaintiffs proceeding under § 1962(c), therefore, must plead and prove an enterprise that is distinct from the defendant. See *id.* at 161-62 ("distinctness" requirement is "legally sound and workable" (citation and internal quotation marks omitted)); see also *United States* v. *Turkette*, 452 U.S. 576, 583 (1981) (existence of an enterprise is a separate element of a RICO offense). Relatedly, plaintiffs must show that a defendant "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs." *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

This Court has previously taken note of this question presented in a different context, but has not had occasion to answer it. In *Kushner*, an individual who was president and sole shareholder of a closely held corporation was accused of conducting the affairs of that corporation (the alleged RICO "enterprise") through a pattern of racketeering. See 533 U.S. at 160. The Second Circuit had held that the individual defendant was not "distinct" from this enterprise because he was an employee of the corporation who was acting within the scope of his authority. See *id.* at 161. This Court reversed, finding that the defendant, as an individual, was distinct from the corporation he controlled. See *id.* at 163. Indeed, *Kushner* presented a classic RICO fact pattern—an

individual defendant using an organization (the RICO enterprise) for criminal purposes.

This Court noted that the case presented no need to examine the converse fact pattern, *i.e.*, a *corporate* defendant with a purported "enterprise" comprised of itself and its employees and agents. *Id.* at 164. This Court did, however, call such an "enterprise" an "oddly constructed entity" and noted it would present "quite different circumstances" than the enterprise in *Kushner*. *Id.* This case presents the "oddly constructed entity" noted by the *Kushner* Court.

Grappling with this issue, the courts of appeals generally have recognized that a defendant corporation cannot associate with its divisions or subsidiaries to create a distinct enterprise.[6] Similarly, a defendant corporation's association with its own employees does not form an enterprise distinct from the corporation itself.[7] The circuits are divided, however, on whether a distinct RICO enterprise can consist solely of the corporation and non-employee agents performing corporate functions.

The Second, Third, and Seventh Circuits have held that because a corporation necessarily acts through agents, an "enterprise" consisting of a defendant corporation and agents acting on its behalf cannot be meaningfully distinguished from the corporation itself. The Eleventh Circuit in the decision below and the Sixth Circuit have disagreed, however, concluding that an enterprise can be pled adequately so long as the corporation and the agents in the alleged "enterprise" are "distinct entities," even if those agents are merely performing services for the corporation.

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[6] *See, e.g.*, *Brannon* v. *Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1148-49 (10th Cir. 1998); *Lorenz* v. *CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993).

[7] *See, e.g.*, *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Old Time Enters., Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989).

The "distinct entity" test used by the Eleventh Circuit in the instant case, see *supra* at 8, mirrors the Sixth Circuit's test in *Davis* v. *Mutual Life Insurance Co. of New York*, 6 F.3d 367, 377 (6th Cir. 1993). In *Davis* the plaintiffs brought a RICO claim against the defendant insurance company ("MONY"). Plaintiffs alleged that they were damaged by the fraudulent conduct of Fletcher Insurance Associates ("FIA"), an insurance agency that sold MONY policies. They claimed that FIA was an "enterprise" that MONY operated or managed within the meaning of § 1962(c). See *id.* at 376-77. After a jury verdict for the plaintiffs, MONY appealed, arguing *inter alia* that it was not liable under § 1962(c) because the FIA "enterprise" was insufficiently distinct from MONY. See *id.* at 372, 377. The Sixth Circuit agreed that FIA's employees operated as "sales agents for MONY." *Id.* at 377. Nevertheless, the Sixth Circuit found that FIA was a distinct enterprise from MONY because FIA was a "distinct entity" from MONY with an independent corporate existence. *Id.* ("FIA had its own board of directors, its own business cards, and its own office stationary.").

The Second, Third, and Seventh Circuits have disagreed with this view, holding that a corporation and third parties performing corporate tasks on its behalf cannot constitute an enterprise distinct from the corporation itself. See *Baker* v. *IBP, Inc.*, 357 F.3d 685, 691-92 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004); *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997); *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998); *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991). These Circuits have based their conclusions on two related rationales. First, such an "enterprise" is not distinct from the corporation itself. Because a corporation can act only through agents, an "enterprise" of a defendant and entities acting on its behalf "is in reality no more than the defendant itself." *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d

Cir. 1994); see *Fitzgerald*, 116 F.3d at 228 (Posner, C.J.); *Discon*, 93 F.3d at 1064; *Brittingham*, 943 F.2d at 303. Second, a corporation accused of conducting an "enterprise" that consists of the corporation and third parties performing corporate functions is not conducting or participating in the conduct of the affairs of some separate enterprise—it is conducting *the corporation's own* affairs. See *Baker*, 357 F.3d at 691-92.

In a case presenting allegations nearly identical to those made by respondents here, the Seventh Circuit held that such allegations failed to establish an enterprise distinct from the corporation. See *Baker*, 357 F.3d at 692; compare Pet. App. 9a (recognizing that enterprise holding "puts our circuit in conflict with the Seventh Circuit's decision in *Baker v. IBP, Inc.*"). The *Baker* plaintiffs were putative representatives of a class of employees at a meat-processing plant owned by the defendant, IBP. See 357 F.3d at 686. The plaintiffs brought a claim under § 1964(c), alleging that IBP knowingly employed large numbers of illegal aliens, ignored fraudulent documentation, and helped unauthorized employees to avoid detection by immigration authorities. See *id.* at 686-87. The plaintiffs further alleged that IBP paid "recruiters" who provided it with illegal alien employees and that IBP had "arrangements" with certain immigrant welfare organizations who referred known illegal aliens to IBP. *Id.* at 687. The plaintiffs claimed that IBP's employment of illegal aliens had depressed their wages. See *id.*

The plaintiffs alleged that the RICO enterprise was "IBP plus the persons and organizations who help it find aliens to hire." *Id.* at 691. The *Baker* court held that this allegation failed to specify a distinct enterprise. The court noted that an allegation that "IBP plus its agents and employees" constituted an enterprise was a "theory that won't fly," because such an "association" would be nothing more than the corporation itself. *Id.* Moreover, the court held that IBP had not operated or managed any separate enterprise; rather,

"[t]he nub of the complaint is that IBP operates *itself* unlawfully—it is IBP that supposedly hires, harbors, and pays the unlawful workers." *Id.* Because the supposed enterprise was not distinct from IBP itself, the Seventh Circuit concluded that plaintiffs had not alleged a RICO violation. See *id.* at 692.

Similarly, in *Fitzgerald* the Seventh Circuit found that the defendant Chrysler's association with its "affiliates and agents" was not a separate enterprise. 116 F.3d at 226 (Posner, C.J.). The *Fitzgerald* plaintiffs alleged that Chrysler had engaged in a scheme fraudulently to deny warranty protection to consumers, and that it carried out this scheme through an "association-in-fact" enterprise with Chrysler dealerships. See *id.* The Seventh Circuit held that this supposed enterprise was not distinct from Chrysler itself. See *id.* at 228. The court noted that this alleged enterprise was far afield from the prototypical RICO enterprise, and it recognized the illogic in applying RICO liability to a corporation using outside agents when no liability would attach for the corporation's use of its own employees in the same way. See *id.* at 227. "[W]e cannot imagine . . . applying RICO to a free-standing corporation such as Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does." *Id.*

The Second and Third Circuits have reached similar conclusions. In *Riverwoods*, the Second Circuit held that "a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of a defendant" is not distinct from the corporate defendant. 30 F.3d at 344. While *Riverwoods* applied that rule in the context of an alleged enterprise constituting the corporation and its own employees, see *id.* at 344-45, the Second Circuit later followed the same rule to hold in *Discon* that a corporation and third parties working on its behalf could not form an enterprise. In *Discon*, the plaintiffs alleged that the enterprise consisted of several

entities within a single corporate structure and their "attorneys, accountants and other agents." 93 F.3d at 1064 (internal quotation marks omitted). The Second Circuit concluded that this enterprise was indistinguishable from the corporation itself; neither a corporation's "agents" nor its "employees" were distinct from the corporation "so long as those persons act on behalf of the corporation." *Id.*[8]

The Third Circuit likewise has held that an "enterprise" consisting of a defendant corporation and advertising agencies acting on its behalf is not distinct from the corporation itself. See *Brittingham*, 943 F.2d at 302. In *Brittingham* the court explained that a corporate defendant is differently situated from an individual defendant accused of manipulating his corporate employer; "when a defendant is itself a collective entity, it is more likely that the alleged enterprise is in reality no different from the association of individuals or entities that constitute the defendant or carry out its actions." *Id.* at 302.[9]

The stark conflict between the decisions of the Sixth and Eleventh Circuits and those of the Second, Third, and Seventh Circuits on whether a corporation and outside entities performing its corporate functions can together form a RICO enterprise is an issue of national importance that warrants this Court's review. The mechanical "distinct entity" test applied by the Sixth and Eleventh Circuits would effect a drastic and unwarranted expansion of RICO liability into an area far

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[8] This Court's decision in *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998), reversed the Second Circuit's decision only as to the plaintiffs' Sherman Act claims; this Court did not review the Second Circuit's decision on the RICO claims. *Id.* at 133.

[9] The Third Circuit later overruled a different portion of *Brittingham*, that addressing application of § 1962(c) to "officers and employees acting through a corporate enterprise," *see Jaguar Cars, Inc.* v. *Royal Oak Motor Car Co.*, 46 F.3d 258, 266, 268-69 (3d Cir. 1995). Jaguar did not alter *Brittingham*'s holding that a defendant corporation and its third-party agents could not constitute a RICO enterprise. *See id.* at 268.

afield from the initial purpose of the statute. While it is true that RICO has been applied in circumstances different from its initial purpose "to attack the 'infiltration of organized crime and racketeering into legitimate organizations,'" *Reves*, 507 U.S. at 185 (quoting S. Rep. No. 91-617, at 76 (1969)), RICO was clearly not designed as a general civil liability remedy with treble damages against corporations. On the contrary, the requirements of § 1964, including the enterprise requirement, are "critical limitation[s]" on the applicability of RICO. *Id.* at 183.

The Eleventh Circuit's "distinct entity" rule all but eliminates the enterprise requirement for the vast majority of corporate defendants, because it allows plaintiffs to plead an "enterprise" in any case by alleging the involvement of a third party corporate agent. Yet every corporation must act through agents to carry out business—companies hire advertisers to prepare advertising campaigns, insurance companies use agents to sell policies, and manufacturers use employment agencies to find workers. Under the Eleventh Circuit's rule, each of these corporations could be held liable under RICO simply because it hired an outside company to perform these tasks, rather than using its own employees. The rule would, in effect, make a broad range of routine corporate conduct actionable under RICO. This dramatic increase of corporate RICO liability based on nothing more than the vagaries of its corporate organization is unwarranted "and makes little sense from a policy perspective." *Brannon* v. *Boatman's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1147 (10th Cir. 1998). As Judge Posner observed, recognizing the sort of "enterprise" that the Eleventh Circuit accepted would create an incentive for corporations to insulate themselves from RICO liability by vertically integrating functions that would otherwise be outsourced to other companies. See *Fitzgerald*, 116 F.3d at 227. RICO was certainly not intended to encourage corporate consolidation or any particular

business structure.[10] Accordingly, this dramatic expansion of RICO liability warrants review.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE REQUIREMENT THAT RICO PLAINTIFFS ADEQUATELY PLEAD A PROXIMATELY CAUSED INJURY TO BUSINESS OR PROPERTY.

This case presents a second significant question for this Court's review—what a plaintiff must plead to establish standing to bring a civil RICO action. The Eleventh Circuit held that plaintiffs' conclusory allegations that Mohawk's employment of "hundreds" of illegal aliens somehow depressed hourly wages throughout Georgia were sufficient to establish proximately caused harm to plaintiffs' "business or property." Pet. App. 14a. The Eleventh Circuit's acceptance of these conclusory allegations of direct injury to "business or property" runs contrary to decisions in other Circuits and is sharply out of step with this Court's own interpretation of RICO standing.

Civil RICO actions may only be brought by "person[s] injured in [their] business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). Section 1964(c) embodies two substantive limitations on the types of plaintiffs who may recover civil RICO damages. First, putative plaintiffs must have suffered an injury to their "business or property." Second, the "by reason of" language of § 1964(c) limits standing to those plaintiffs who can demonstrate that a RICO violation was the proximate cause of

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[10] Moreover, the disagreement among the courts of appeals on this question presents a significant risk of forum shopping. Corporations targeted by civil RICO actions often do business in several states, and this circuit split means that the same corporation would be subject to different liability in different states. While an "enterprise" consisting of a corporation and its agents would not be sufficient in Illinois or New York, such an enterprise would be sufficient in Ohio or Florida.

their injury. See *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 267-68 (1992). Together these two requirements reflect Congress's determination to limit the class of civil plaintiffs who are permitted to sue under RICO. See *id.* at 274.

Here, plaintiffs allege that they suffered an injury to their "business or property" because wages that they freely agreed to accept were suppressed. Although recognizing that the statutory terms "business or property" are "words of limitation" that require plaintiffs to allege a concrete financial loss, the Eleventh Circuit found plaintiffs' allegations a sufficiently concrete business injury for § 1964(c) standing. Pet. App. 11a-12a (internal quotation marks omitted). Specifically, the Eleventh Circuit concluded that an employee working for an agreed-upon (but allegedly depressed) wage nevertheless has § 1964(c) standing. The court reasoned that the employee had a "'legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes.'" *Id.* at 12a (quoting *Mendoza*, 301 F.3d at 1168 n.4).[11]

The Eleventh Circuit's opinion exacerbates the confusion amongst the circuits as to the types of injury that can constitute an injury to "business or property." Significantly, the Fifth Circuit has recognized that plaintiffs who receive "precisely what they bargained for" do not suffer an injury to their business or property under RICO. *Price* v. *Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (per curiam). The *Price* plaintiffs claimed an injury from their purchase of

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[11] The Eleventh Circuit reasoned that its conclusion was supported by the Ninth Circuit's opinion in *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002), but that case included a critical allegation absent here: an allegation that defendants had "the ability to define wages in [the] labor market, akin to monopsony or oligopsony power." *Id.* These allegations of the defendants' "singula[r]" market power to "affect wages throughout the labor market" were dispositive in the Ninth Circuit's analysis. *Id.* at 1166-67. In the instant case, plaintiffs have not alleged that Mohawk had the power to define wages throughout Georgia.

trading cards that were allegedly marketed in violation of the gambling laws. See *id.* at 605. The court held that the plaintiffs had not suffered an injury to their business or property, because they did "'not allege that they received something different than precisely what they bargained for: six to twenty cards in a pack with a chance that one of those cards may be [a valuable collectible card].'" *Id.* at 607. It was irrelevant that the plaintiffs may have had a state law property interest to recover gambling losses, because such an "'intangible property interest' is not sufficient to confer RICO standing." *Id.*

The Eleventh Circuit's expansive interpretation of the "business or property" requirement is also contrary to the D.C. Circuit's decision in *Danielson* v. *Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1229 (D.C. Cir. 1991). The *Danielson* plaintiffs alleged that their employers had violated RICO by paying wages below the levels required by the Service Contract Act. See *id.* at 1226. The D.C. Circuit questioned whether plaintiffs who had voluntarily accepted supposedly insufficient wages could suffer an injury to their "business or property." *Id.* at 1229. Even though the plaintiffs might have been "entitled to higher paying job classifications," the D.C. Circuit noted that "each employee in fact received precisely the compensation bargained for in return for the agreed work." *Id.*

The Eleventh Circuit's decision that plaintiffs could satisfy § 1964(c) by alleging an intangible "business interest" in the employment relationship with their employer that was unhampered by alleged RICO violations runs contrary to *Danielson* and *Price* and constitutes an unwarranted evisceration of the "business or property" limit on RICO standing. The blunt instrument of treble-damages civil RICO liability was never intended to be available for every plaintiff who claimed damage from an alleged RICO violation. Rather, Congress made a substantive judgment to permit civil RICO suits only by plaintiffs who had particular types of

damage—an injury to their "business" or to their "property." By permitting plaintiffs who voluntarily accepted an hourly wage to sue for an inflated retroactive pay raise, the Eleventh Circuit effectively has read the "business or property" limitation out of the statute.[12]

Indeed, the acceptance of these nebulous injuries undermines the requirement that a plaintiff must allege "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. The Eleventh Circuit's opinion sharply undercuts *Holmes*' direct injury requirement, finding injury based on plaintiff's allegations that Mohawk illegally hired *other* employees. See Pet. App. 18a. Yet the *direct* victims are either the illegally hired workers themselves or the legal employees *not* hired, and certainly not plaintiffs. *Holmes,* 503 U.S. at 271 (remedies for RICO harms should "'not . . . go beyond the first step.'"). The members of the former group are, by the plaintiffs' own allegations, those with diminished "bargaining power" who supposedly "are beholden to Mohawk" and have "no effective means to complain about the terms of their employment," and thus earn depressed wages. *Id.* ¶ 33, 36.[13]

The Eleventh Circuit placed talismanic reliance on plaintiffs' conclusory assertion that they had been injured "by direct and proximate reason of Mohawk's illegal conduct."

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[12] Indeed, plaintiffs throughout the country have filed at least four class actions under RICO seeking a retroactive pay raise. *See* Pet. App. 9a; *Trollinger*, 370 F.3d at 606-07; *Baker*, 357 F.3d at 686-87; *Mendoza*, 301 F.3d at 1166.

[13] In fact, undocumented immigrants have brought at least one RICO action against an employer for hiring them and allegedly violating labor laws because they are "unaware of their rights, afraid to complain, and thus easily exploited." *See* Revised First Am. Compl. at ¶ 3, *Zavala v. Wal-Mart Stores, Inc.*, No. 03-Civ.-5309 (D.N.J., filed Oct. 28, 2004); *see also* Sarah Paoletti & Matt Hayes, *Should illegal aliens be able to sue U.S. employers for labor racketeering?*, Insight on the News, Jan. 6, 2004, at 46.

Pet. App. 14a. This ready acceptance of plaintiffs' conclusions runs contrary to this Court's holding from last term in *Dura Pharmaceuticals, Inc.* v. *Broudo*, that a court may not simply rubber-stamp a general allegation of proximate cause. 125 S. Ct. 1627, 1634 (2005).[14] Instead, plaintiffs can only survive a motion to dismiss by pleading specific facts that illustrated a chain of "causal connection" linking the defendant's actions and their injury. See *id.*[15]

Similarly, in the present case, plaintiffs have pled, at best, only the first link in a chain of causation—that Mohawk was supposedly employing "hundreds" of illegal aliens. Plaintiffs leap from this allegation to the conclusion that the additional workers depressed wages throughout Georgia. But "this is far from inevitably so." *Id.* at 1632. Wages are affected by a "tangle of factors," *id.*, none of which is accounted for in plaintiffs' conclusory allegation of causation. And plaintiffs

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[14] The *Dura* plaintiffs pled that they were harmed by the purchase of stock at an inflated price. *See Dura*, 125 S. Ct. at 1630. This Court recognized that an inflated price "might" lead to a subsequent loss, but that it was "far from inevitably so." *Id.* at 1632 (emphasis omitted). Instead, price could be affected by a "tangle of factors" completely unrelated to the defendants' alleged wrongful conduct. *Id.*

[15] Indeed, this tension over pleading a proximately caused RICO injury exists within a larger division among the circuits regarding what a plaintiff must plead in order to survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Citing this Court's opinion in *Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 506 (2002), the Third and Ninth Circuits have held that a plaintiff need not plead facts to survive such a motion to dismiss. *See Alston* v. *Parker*, 363 F.3d 229, 233 n.6 (3d Cir. 2004); *Kwai Fun Wong* v. *United States*, 373 F.3d 952, 969-70 (9th Cir. 2004) (holding plaintiffs' conclusory allegations of "discriminatory animus" were sufficient to state a claim). Conversely, the Fourth Circuit concluded that *Swierkiewicz* did not "alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim." *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) (citing *Iodice* v. *United States*, 289 F.3d 270, 281 (4th Cir. 2002)). The Eleventh Circuit's opinion also provides the Court with the opportunity to clarify this critical issue.

failed to plead an essential link in the chain of causation—that Mohawk had sufficient market power to affect their wages. See *supra* at note 11. Without such power, it is common sense that Mohawk's supposed payment of below-market wages would simply cause legal workers to go elsewhere—not to remain at Mohawk and voluntarily accept supposedly depressed wages. Rather than examining plaintiffs' allegations in light of *Dura*, the Eleventh Circuit instead held that it was enough for plaintiffs generally to make the conclusory allegation that Mohawk's conduct "ha[d] the purpose and direct result of depressing the wages paid to the plaintiffs." Pet. App. 14a.[16] The Eleventh Circuit's lax approach to § 1964(c)'s requirement that plaintiffs demon-strate proximately caused harm to "business or property" merits this Court's attention.

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[16] The Eleventh Circuit's divergence from this Court's proximate cause jurisprudence is in stark contrast with the Seventh Circuit's rejection of a similar theory as inherently speculative. *See Baker*, 357 F.3d at 692. Although ultimately deciding the case based on plaintiffs' failure to adequately plead a distinct enterprise, the Seventh Circuit noted that an increased supply of labor due to hiring illegal aliens would not have a localized effect, but would influence "wages throughout the region (if not the country)." *Id.* Further, a myriad of factors would influence whether the defendant's actions were the proximate cause of plaintiffs' harm, including whether certain employees' decision to move to another employer who was paying higher wages would have a greater effect on wages than defendant's actions. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-13740

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,
Plaintiffs-Appellees,

v.

MOHAWK INDUSTRIES, INC.,
Defendant-Appellant.

June 9, 2005

Appeal from the United States District Court for the Northern District of Georgia.

Before ANDERSON, HULL and GIBSON*, *Circuit Judges.*

PER CURIAM:

In this case, Plaintiffs Shirley Williams, Gale Pelfrey, Bonnie Jones, and Lora Sisson are current or former hourly employees of Defendant Mohawk Industries, Inc. The plaintiffs filed this class-action complaint alleging that Mohawk's widespread and knowing employment and harboring of illegal workers allowed Mohawk to reduce labor costs by depressing wages for its legal hourly employees and discourage worker's-compensation claims, in violation of federal and state RICO statutes. The plaintiffs also alleged

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

that Mohawk was unjustly enriched by the lower wages it paid, as well as the reduced number of worker's-compensation claims it paid. The district court denied in part and granted in part Mohawk's 12(b)(6) motion, and this interlocutory appeal followed. After review and oral argument, we affirm in part and reverse in part.

I. BACKGROUND

Mohawk is the second largest carpet and rug manufacturer in the United States and has over 30,000 employees. According to the plaintiffs, Mohawk has conspired with recruiting agencies to hire and harbor illegal workers in an effort to keep labor costs as low as possible.[1] For example, according to the plaintiffs' complaint

> Mohawk employees have traveled to the United States Border, including areas near Brownsville, Texas, to recruit undocumented aliens that recently have entered the United States in violation of federal law. These employees and other persons have transported undocumented aliens from these border towns to North Georgia so that those aliens may procure employment at Mohawk. Mohawk has made various incentive payments to employees and other recruiters for locating workers that Mohawk eventually employs and harbors.

Furthermore, "[v]arious recruiters, including Mohawk employees, have provided housing to these illegal workers upon their arrival in North Georgia and have helped them find

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[1] At this point in the litigation, we must assume the facts set forth in the plaintiffs' complaint are true. *See Marsh v. Butler County*, 268 F.3d 1014, 1023 (11th Cir.2001) (*en banc*) (setting forth the facts in the case by "[a]ccepting all well-pleaded factual allegations (with reasonable inferences drawn favorably to Plaintiffs) in the complaint as true"). Because we must accept the allegations of plaintiffs' complaint as true, what we set out in this opinion as "the facts" for Rule 12(b)(6) purposes may not be the actual facts.

illegal employment with Mohawk." Additionally, Mohawk knowingly or recklessly accepts fraudulent documentation from the illegal aliens.

The plaintiffs further allege that Mohawk has concealed its efforts to hire and harbor illegal aliens by destroying documents and assisting illegal workers in evading detection by law enforcement. According to plaintiffs' complaint, Mohawk takes steps to shield those illegal aliens from detection by, among other things, helping them evade detection during law enforcement searches and inspections at Mohawk's facilities.

According to the complaint, Mohawk's widespread and knowing employment and harboring of illegal workers has permitted Mohawk to reduce labor costs. Mohawk has done so by reducing the number of legal workers it must hire and, thereby, increasing the labor pool of legal workers from which Mohawk hires. This practice permits Mohawk to depress the wages it pays its legal hourly workers.

Finally, the plaintiffs allege that Mohawk is "able to save substantial sums of money" by paying its workers reduced wages. Furthermore, Mohawk knows that illegal workers are less likely to file worker's-compensation claims, and, therefore, Mohawk is able to save additional monies. According to the plaintiffs, these benefits constitute unjust enrichment under state law.

Mohawk filed a Rule 12(b)(6) motion to dismiss the plaintiffs' complaint for failure to state a claim. The district court determined that the plaintiffs had stated a claim under both federal and state RICO statutes, as well as a claim for unjust enrichment under state law for paying legal workers lower wages because of the illegal workers Mohawk employed. However, the district court dismissed the plaintiffs' unjust-enrichment claim insofar as it was based on the reduced

number of worker's-compensation claims Mohawk was forced to pay.[2]

II. FEDERAL RICO CLAIMS

Pursuant to 18 U.S.C. § 1962(c), it is illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c). Thus, in order to establish a federal civil RICO violation under § 1962(c), the plaintiffs "must satisfy four elements of proof: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Jones v. Childers*, 18 F.3d 899, 910 (11th Cir.1994) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985)). These requirements apply whether the RICO claim is civil or criminal in nature.

In civil cases, however, RICO plaintiffs must also satisfy the requirements of 18 U.S.C. § 1964(c). Section 1964(c) states that "[a]ny person injured in his business or property by reason of" RICO's substantive provisions has the right to "recover threefold the damages he sustains . . . ." 18 U.S.C. § 1964(c). Thus, under § 1964(c), civil RICO claimants, such as the plaintiffs here, must show (1) the requisite injury to "business or property," and (2) that such injury was "by reason of" the substantive RICO violation. We discuss each of these requirements in turn.

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[2] This Court reviews the denial of a Rule 12(b)(6) motion "de novo, applying the same standard as the district court did." *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir.2002). A complaint should not be dismissed pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Beck v. Deloitte & Touche*, 144 F.3d 732, 735 (11th Cir.1998) (internal quotation marks and citation omitted).

A. Pattern of Racketeering Activity

As mentioned above, there are four requirements under § 1962(c). Because elements (3) and (4)—a pattern of racketeering activity—are easily met in this case (at least at the motion-to-dismiss stage), we address them first.

"A 'pattern of racketeering activity,' for purposes of the RICO Act, 'requires at least two acts of racketeering activity.'" *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir.1994), *modified on other grounds by* 30 F.3d 1347 (11th Cir.1994). "An act of racketeering is commonly referred to as a 'predicate act.' A 'pattern' of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts." *Maiz v. Virani*, 253 F.3d 641, 671 (11th Cir.2001) (quotation marks, citations, and brackets omitted). "If distinct statutory violations are found, the predicate acts will be considered to be distinct irrespective of the circumstances under which they arose." *Cox*, 17 F.3d at 1397 (quotation marks, citations, and emphasis omitted).

According to 18 U.S.C. § 1961(1)(F), "'racketeering activity' means any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), . . . if the act indictable under such section of such Act was committed for the purpose of financial gain." In this case, the plaintiffs have alleged that the defendant has engaged in an open and ongoing pattern of violations of section 274 of the Immigration and Nationality Act. In particular, plaintiffs allege that Mohawk has violated and continues to violate: (1) 8 U.S.C. § 1324(a)(3)(A), which makes it a federal crime to "knowingly hire[ ] for employment at least 10 individuals with actual knowledge that the individuals are aliens" during a twelve-month period; (2) 8 U.S.C. § 1324(a)(1)(A)(iii), which makes it a federal crime to "conceal[ ], harbor[ ], or shield from detection, or attempt[ ] to conceal, harbor or shield from detection" aliens

that have illegally entered the United States; and (3) 8 U.S.C. § 1324(a)(1)(A)(iv), which makes it a federal crime to "encourage[ ] or induce[ ] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." According to the plaintiffs' complaint, Mohawk has committed hundreds, even thousands, of violations of federal immigration laws. Consequently, we conclude that the plaintiffs have properly alleged a "pattern of racketeering activity."[3]

B. Conduct of an Enterprise

With regard to elements (1) and (2) of the four-part test under § 1962(c), the plaintiffs must establish "conduct of an enterprise" and that the enterprise had a common goal. *See United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981) ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."). Furthermore, Mohawk "must participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 1173, 122 L.Ed.2d 525 (1993).

An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). As stated in *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir.2000), "the existence of an enterprise is proved by evidence of an

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[3] There is no dispute that these predicate acts, if they occurred, are related. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1496-97 (11th Cir.1991) ("Predicate acts are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." (internal quotation marks and citation omitted)).

ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." (internal quotation marks and citation omitted). Furthermore, "the definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity requisite to the RICO violation." *Id.*

In this case, the plaintiffs have alleged that Mohawk and third-party temp agencies/recruiters have conspired to violate federal immigration laws, destroy documentation, and harbor illegal workers. Specifically, the plaintiffs allege that

> [e]ach recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment need by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity.

Given the Rule 12(b)(6) stage of the litigation, the plaintiffs' complaint must be taken as true, and it has sufficiently alleged an "enterprise" under RICO; that is an association-in-fact between Mohawk and third-party recruiters. This Court has never required anything other than a "loose or informal" association of distinct entities. Mohawk and the third-party recruiters are distinct entities that, at least according to the complaint, are engaged in a conspiracy to bring illegal

workers into this country for Mohawk's benefit. As such, the complaint sufficiently alleges an "enterprise" under RICO.

As for the common purpose, the plaintiffs' complaint alleges that "[t]he recruiters and Mohawk share the common purpose of obtaining illegal workers for employment by Mohawk." The complaint further alleges that "[e]ach recruiter is paid a fee for each worker it supplies to Mohawk" and that "Mohawk has made various incentive payments to employees and other recruiters for locating workers that Mohawk eventually employs and harbors." Furthermore, "[t]he acts of racketeering activity committed by Mohawk have the same or similar objective: the reduction of wages paid to Mohawk's hourly workforce." What is clear from the complaint is that each member of the enterprise is allegedly reaping a large economic benefit from Mohawk's employment of illegal workers.

In *United States v. Church*, 955 F.2d 688, 698 (11th Cir. 1992), this Court concluded that the common purpose of making money was sufficient under RICO. Because the complaint clearly alleges that the members of the enterprise stand to gain sufficient financial benefits from Mohawk's widespread employment and harboring of illegal workers, the plaintiffs have properly alleged a "common purpose" for the purposes of RICO.

Furthermore, Mohawk "must participate in the operation or management of the enterprise itself." *Reves*, 507 U.S. at 185, 113 S.Ct. at 1173. That is, Mohawk "must have some part in directing" the affairs of the enterprise. *Id.* at 179, 113 S.Ct. at 1170. However, the Supreme Court has cautioned that "RICO liability is not limited to those with primary responsibility for the enterprise's affairs . . . ." *Id.* In their complaint, the plaintiffs allege that "Mohawk participates in the operation and management of the affairs of the enterprise . . . ," which includes some direction over the recruiters. Whatever difficulties the plaintiffs may have in proving such

an allegation, they have sufficiently alleged that Mohawk is engaged in the operation or management of the enterprise. Again, at this stage in the litigation, we simply cannot say whether the plaintiffs will be able to establish that Mohawk had "some part in directing" the affairs of the enterprise. However, they have alleged sufficient acts to survive a Rule 12(b)(6) motion.

Accordingly, we conclude that the plaintiffs' complaint states a claim that is cognizable under § 1962(c). In so doing, we note that the allegations in this case are similar to those in cases recently decided by the Second, Sixth, and Ninth Circuits. *See Trollinger v. Tyson Foods*, 370 F.3d 602 (6th Cir.2004) (former employees alleging employer used illegal immigrants in order to depress wages); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir.2002) (legally documented workers alleging that employers leveraged hiring of undocumented workers in order to depress wages); *Commercial Cleaning Servs., L.L.C. v. Colin Service Sys., Inc.*, 271 F.3d 374 (2d Cir.2001) (company alleging competitor hired undocumented workers in order to underbid competing firms). In each of these decisions, the circuit court determined that, at the Rule 12(b)(6) stage, the plaintiffs had alleged sufficient damages to be permitted to pursue their RICO claims. Although none of the opinions specifically addressed § 1962(c)'s requirements, each of these cases has essentially the same factual basis for RICO liability as the complaint before this Court.

We recognize that the above conclusion puts our circuit in conflict with the Seventh Circuit's decision in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir.2004), *cert. denied*, — U.S. —, 125 S.Ct. 412, 160 L.Ed.2d 318 (2004). In *Baker*, an employees' class-action lawsuit alleged that a meat-processing facility conspired with recruiters (and a Chinese aid group), and violated RICO by employing undocumented, illegal workers in an effort to drive down employee wages.

The Seventh Circuit concluded that the employees' union was a necessary party to the lawsuit. *Id.* at 690-91.

However, the Seventh Circuit in *Baker* also concluded that there was "another fatal problem" with the complaint. *Id.* at 691. Although stating that an "enterprise" arguably existed, the Seventh Circuit determined that there was not a common purpose among the entities in the enterprise. *Id.* Specifically, the Seventh Circuit stated that the employer "wants to pay lower wages; the recruiters want to be paid more for services rendered (though [the employer] would like to pay them less); the Chinese Mutual Aid Association wants to assist members of its ethnic group. These are divergent goals." *Id.*

In our circuit, however, there has never been any requirement that the "common purpose" of the enterprise be the sole purpose of each and every member of the enterprise. In fact, it may often be the case that different members of a RICO enterprise will enjoy different benefits from the commission of predicate acts. This fact, however, is insufficient to defeat a civil RICO claim. Rather, all that is required is that the enterprise have *a* common purpose. In this case, the complaint alleges that Mohawk and the recruiters, under Mohawk's direction, worked together to recruit illegal workers to come to Georgia and that they had the common purpose of providing illegal workers to Mohawk so that Mohawk could reduce its labor costs and the recruiters could get paid. This commonality is all that this circuit's case law requires. *See Church*, 955 F.2d at 698. Again, while the plaintiffs may be unable to prove such allegations at trial, we cannot say at this 12(b)(6) stage of the litigation that they have failed to properly allege a common purpose.

We recognize that the *Baker* Court also concluded that there was no way to establish that the employer "operate[d] or manage[d] th[e] enterprise through a pattern of racketeering activity." *Baker*, 357 F.3d at 691 (emphasis omitted). However, as this Court has noted, "the Supreme Court has yet to

delineate the exact boundaries of the operation or management test." *United States v. Starrett*, 55 F.3d 1525, 1546 (11th Cir.1995). Although the exact boundaries have not been established, it is possible that the plaintiffs will be able to establish that Mohawk played some part in directing the affairs of the enterprise. Whether the plaintiffs ultimately establish sufficient evidence to meet the boundaries of the operation-or-management test is a question best answered at the summary-judgment stage or at trial. Accordingly, we conclude that the plaintiffs have sufficiently alleged conduct that may potentially satisfy the operation-or-management test. As such, the plaintiffs are entitled to continue with their claims at this juncture.

Having reviewed the four elements of § 1962(c), we turn to § 1964(c).

C. Injury to "Business or Property" Interest Under RICO

As indicated above, RICO's civil-suit provision states that "[a]ny person injured in his business or property by reason of" RICO's substantive provisions has the right to "recover threefold the damages he sustains . . . ." 18 U.S.C. § 1964(c). "The terms 'business or property' are, of course, words of limitation which preclude [certain forms of] recovery." *Doe v. Roe*, 958 F.2d 763, 767 (7th Cir.1992). However, RICO is to be "liberally construed." *Sedima*, 473 U.S. at 497-98, 105 S.Ct. at 3285-86. Accordingly, we must determine whether the plaintiffs have a "business or property" interest that could be injured under RICO. We need not reach whether plaintiffs have a property interest because plaintiffs clearly have alleged a business interest affected by Mohawk's alleged RICO violations.

Indeed, this case is similar to the Ninth Circuit's *Mendoza* decision, where legally documented agricultural workers sued fruit growers under RICO alleging that the growers depressed wages by hiring illegal workers. In *Mendoza*, the defendant

claimed that the employees would have to show a "'property right' in the lost wages[ ] by showing that they were promised or contracted for higher wages." *Mendoza*, 301 F.3d at 1168 n. 4. The Ninth Circuit concluded that this argument was misplaced, pointing out that the plaintiffs' claim did not implicate procedural due process. *Id.* Rather, the Ninth Circuit concluded that "what is required is precisely what the employees allege here: a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." *Id.* (citations omitted). Given that a relationship clearly exists between plaintiff workers and their employer, Mohawk, we conclude that a similar business interest exists in this case, and that the employees' alleged injury to their business interests satisfies the business-interest requirement. Consequently, the plaintiffs have alleged a sufficient injury to a business interest to pursue their RICO claims.

D. "By Reason Of" the Substantive RICO Violations

We now turn to the "by reason of" requirement contained in § 1964(c). The "by reason of" requirement implicates two concepts: (1) a sufficiently direct injury so that a plaintiff has standing to sue; and (2) proximate cause, whereby the wrongful conduct is shown to be a substantial cause of the alleged injury and the causal connection is foreseeable and not speculative. *See Trollinger*, 370 F.3d at 612 ("RICO's civil-suit provision imposes two distinct but overlapping limitations on claimants—standing and proximate cause."); *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292, 1307 (11th Cir.2003), *cert. denied*, 541 U.S. 1037, 124 S.Ct. 2094, 158 L.Ed.2d 723 (2004) ("[O]ne or more of the predicate acts [in a RICO claim] must not only be the 'but for' cause of the injury, but the proximate cause as well." (citations omitted)); *Mendoza*, 301 F.3d at 1168-72 (concluding that the plaintiffs had satisfied both "statutory" and "constitutional" standing requirements of RICO); *see also Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258,

268-69, 112 S.Ct. 1311, 1318, 117 L.Ed.2d 532 (1992) (stating in a RICO case that "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover" (citations omitted)). Despite some significant overlap, we address the proximate cause and standing concepts separately.[4]

(i) Proximate Cause

"It is well-established that RICO plaintiffs must prove proximate causation in order to recover." *Cox*, 17 F.3d at 1399 (citations omitted). "A proximate cause is not, however, the same thing as a sole cause. Instead, a factor is a proximate cause if it is a substantial factor in the sequence of responsible causation." *Id.* (internal quotation marks and citation omitted).

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[4] As the Sixth Circuit aptly explained,

> the two concepts overlap and that is particularly true in the context of civil RICO claims. As a general matter, they overlap because a plaintiff who lacks standing to vindicate a derivative injury also will be unable to show proximate cause. And as a matter of RICO law, the two concepts overlap because they both grow out of the "by reason of" limitation in RICO—namely, the requirement that claimants establish that their injury was "by reason of" a RICO predicate act violation. The "by reason of" limitation, in other words, bundles together a variety of "judicial tools," some of which are traditionally employed to decide causation questions and some of which are employed to decide standing questions. *Holmes*, 503 U.S. at 268, 112 S.Ct. [at 1318] ("Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient.") (quotation omitted). . . .

Trollinger, 370 F.3d at 613.

In this case, the plaintiffs have alleged sufficient proximate cause to withstand defendant Mohawk's motion to dismiss. According to their complaint, Mohawk has hired illegal workers "[i]n an effort to keep labor costs as low as possible." Furthermore, "Mohawk's employment and harboring of large numbers of illegal workers has enabled Mohawk to depress wages and thereby pay all of its hourly employees, including legally employed workers who are members of the class, wages that are lower than they would be if Mohawk did not engage in this illegal conduct." Again, the complaint alleges that "Mohawk's widespread employment and harboring of illegal workers has substantially and unlawfully increased the supply of workers from which Mohawk makes up its hourly workforce. This unlawful expansion of the labor pool has permitted Mohawk to depress the wages that it pays all its hourly employees . . . ." The plaintiffs also allege that "[o]ne purpose and intended effect of Mohawk's widespread employment and harboring of illegal workers is to deprive Mohawk's hourly workforce of any individual or collective bargaining power" and that they "were injured by direct and proximate reason of Mohawk's illegal conduct."

Given these allegations, which we must assume are true at this Rule 12(b)(6) stage of the litigation, it is clear that the plaintiffs have properly alleged proximate cause. According to the complaint, Mohawk's widespread scheme of hiring and harboring of illegal workers has the purpose and direct result of depressing the wages paid to the plaintiffs. This is all that is needed to establish proximate cause.

Our conclusion is consistent with the two other circuits to have addressed this proximate cause issue in RICO decisions involving schemes to depress wages of legal workers by widespread hiring of illegal workers. *See Trollinger*, 370 F.3d at 619; *Mendoza*, 301 F.3d at 1171-72.

In *Trollinger*, the Sixth Circuit considered a situation in which former Tyson employees at a poultry processing plant

sued their former employer under RICO, alleging that the use of illegal workers permitted the employer to lower wages via the collective-bargaining agreement with the union representing the employees. The Sixth Circuit, reviewing the district court's dismissal of the employees' complaint under Rule 12(b)(6), determined that "at this preliminary stage in the proceedings" it could not conclude that there was no likelihood of success on the merits. *Trollinger*, 370 F.3d at 619. The Sixth Circuit explained that it remained possible that the legal-worker plaintiffs might prove the following allegations in their complaint:

> (1) that Tyson hired sufficient numbers of illegal aliens to impact the legal employees' wages; (2) that each additional illegal worker hired into the bargaining unit by Tyson has a measurable impact on the bargained-for wage-scale; (3) that the illegal immigrants allegedly brought into this country through Tyson's efforts allowed Tyson not to compete with other businesses for unskilled labor; and (4) that Tyson's legal workers did not "choose" to remain at Tyson for less money than other businesses offered, but had no choice in the matter given the hiring needs of the other businesses in the area and the influx of illegal immigrants at Tyson's facilities. While Tyson's proximate-cause argument may well carry the day at the summary-judgment stage, it requires more assistance than the complaint alone provides.
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> One other circuit has reached the same result on somewhat similar facts . . . *Mendoza*. . . .

Id.[5]

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[5] As noted earlier, in *Mendoza*, the Ninth Circuit was faced with a similar suit in which legally documented agricultural workers sued fruit growers under RICO alleging that the growers depressed wages by hiring illegal-immigrant workers. 301 F.3d at 1166. Under almost the exact same legal theory as advanced in this case, the *Mendoza* Court concluded

Although the plaintiffs in this case may not ultimately satisfy the proximate-cause requirement, we conclude it remains possible that plaintiffs may prove their allegations, and we cannot say at this Rule 12(b)(6) stage that there is no possibility of such proof. Consequently, we join the Sixth and Ninth Circuits in concluding that employees such as the ones in this case have alleged sufficient proximate cause to proceed with their RICO claims.

(ii) Statutory Standing

Lastly, we address RICO's statutory standing limitation that also grows out of the "by reason of" limitation in § 1964(c). "[T]he test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable." *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir.1998); *see Sedima*, 473 U.S. at 496-97, 105 S.Ct. at 3285 ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation" and the plaintiff's damages must "flow from the commission of the predicate acts."); *Green Leaf Nursery*, 341 F.3d at 1307 (stating that plaintiffs must show a "direct relation between the injury asserted and the injurious conduct" and that we ask "whether the alleged conduct was 'aimed primarily' at a third party" (quotation marks and citations omitted)); *Bivens*, 140 F.3d at 906 (concluding that a party whose alleged injuries result from "the misfortunes visited upon a third person by the defendant's acts lacks standing to pursue a claim under RICO" (quotation marks and citation omitted)); *Pelletier v. Zweifel*, 921 F.2d 1465, 1497 (11th Cir.1991) (stating that the plaintiff has RICO standing if he shows "a causal connection between his injury and a

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that the plaintiffs' "causation allegations are sufficient at this stage." *Id.* at 1172.

predicate act").[6] Thus, we must evaluate whether the plaintiffs' injury is sufficiently direct to give plaintiffs standing to sue for Mohawk's alleged RICO violations.

Both the Sixth and Ninth Circuits have expressly concluded that legal workers have sufficiently direct injuries for RICO standing in similar cases. *Trollinger*, 370 F.3d at 615-618; *Mendoza*, 301 F.3d at 1170. The Ninth Circuit's *Mendoza* decision is particularly well-reasoned and instructive on the statutory standing issue.

As mentioned earlier, the *Mendoza* plaintiffs were legal workers who claimed that the purpose and result of the defendants' scheme of hiring undocumented immigrants was to depress the wages of legally documented employees. The Ninth Circuit concluded that the plaintiffs had statutory standing because "we are unable to discern a more direct victim of the illegal conduct." *Mendoza*, 301 F.3d at 1170. The Ninth Circuit explained:

> The documented employees here do not complain of a passed-on harm. They allege that the scheme had the purpose and direct result of depressing the wages paid to them by the growers. Thus, as the district court correctly determined, "plaintiffs have stated a claim that they are the direct victims of the illegal hiring scheme."
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> . . .
>
> We also note that the undocumented workers cannot "be counted on to bring suit for the law's vindication." As the district court noted, the fact that RICO specifically provides that illegal hiring is a predicate offense

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[6] This Court has more often evaluated the "by reason of" requirement primarily as part of its proximate-cause analysis, as opposed to the distinct concept of standing. However, despite significant overlap, we must also examine whether the plaintiffs' injury is sufficiently direct to permit standing.

> indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one.

Id. (internal citations omitted). The Ninth Circuit further stated that

> the workers must be allowed to make their case through presentation of evidence, including experts who will testify about the labor market, the geographic market, and the effects of the illegal scheme. Questions regarding the relevant labor market and the growers' power within that market are exceedingly complex and best addressed by economic experts and other evidence at a later stage in the proceedings.

Id. at 1171.

Plaintiffs' complaint clearly alleges that Mohawk has engaged in widespread and knowing hiring and harboring of illegal aliens with the express purpose and direct result of lowering the wages of legal workers. For example, the complaint alleges that "[o]ne purpose and intended effect of Mohawk's widespread employment and harboring of illegal workers is to deprive Mohawk's hourly workforce of any individual or collective bargaining power." The plaintiffs also allege that "[t]he acts of racketeering activity committed by Mohawk have the same or similar objective: the reduction of wages paid to Mohawk's hourly workforce." Furthermore, the plaintiffs "were injured by direct and proximate reason of Mohawk's illegal conduct." Given this stage of the litigation, we conclude that the plaintiffs have sufficiently alleged that Mohawk's illegal conduct was aimed primarily at them. Consequently, the district court correctly denied Mohawk's 12(b)(6) motion as it relates to the plaintiffs' federal civil RICO claim.

III. STATE LAW RICO

Under the Georgia RICO statute, "[i]t is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money." O.C.G.A. 16-14-4(a). Unlike federal civil RICO, the Georgia RICO statute does not require proof of an "enterprise." *Cobb County v. Jones Group, P.L.C.*, 218 Ga.App. 149, 460 S.E.2d 516, 520-21 (1995). Rather, under Georgia RICO, the plaintiffs need only establish racketeering activity; that is, "a plaintiff must show that the defendant committed predicate offenses (set forth in O.C.G.A. § 16-14-3(9)) at least twice." *Id.* at 521 (quotation marks and citation omitted).

With regard to their state-law RICO claim, the plaintiffs rely on 18 U.S.C. § 1546 (relating to the fraud and misuse of visas, permits, and other documents) for their predicate offenses.[7] Despite being limited to § 1546, the plaintiffs have alleged sufficiently numerous violations to satisfy the racketeering activity requirement under Georgia state law. In fact, according to the complaint, "Mohawk has committed hundreds, probably thousands, of violations of . . . 18 U.S.C. § 1546 as part of its pattern of racketeering activity."

There are, however, two issues under the Georgia RICO statute that warrant further discussion: (1) whether, under the Georgia RICO statute, a corporation may be sued; and (2)

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[7] According to O.C.G.A. § 16-14-3(9)(A)(xxix), "racketeering activity" is defined as "conduct defined as 'racketeering activity' under 18 U.S.C. Section 1961(1)(A), (B), (C), and (D)." The only "racketeering activity" contained in 18 U.S.C. § 1961(1)(A), (B), (C), or (D) on which the plaintiffs rely is 18 U.S.C. § 1546. To the extent the plaintiffs attempt to rely on 8 U.S.C. § 1324, as they do with their federal civil RICO claims, such a claim is barred under the Georgia RICO statute because 8 U.S.C. § 1324 is listed as a "racketeering offense" in 18 U.S.C. § 1961(1)(F), and not in subsections (A), (B), (C), or (D).

whether the plaintiffs have sufficiently alleged proximate cause to have standing to bring a Georgia RICO suit.

A. Whether Corporations May be Sued Under Georgia RICO

"Although this is a civil suit, RICO predicate acts are criminal offenses." *Cobb County*, 460 S.E.2d at 521 (quotation marks omitted). Therefore, in order to determine whether a corporation may be held liable under RICO, Georgia courts look to O.C.G.A. § 16-2-22. *See Cobb County*, 460 S.E.2d at 521.

There are two means by which a corporation may be held liable: (1) directly (under O.C.G.A. § 16-2-22(a)(1)); and (2) through its agents and employees under certain situations (under O.C.G.A. § 16-2-22(a)(2)). The Georgia Supreme Court already has concluded that corporations may not be sued directly under RICO. *Clark v. Security Life Ins. Co. of America*, 270 Ga. 165, 509 S.E.2d 602, 604 n. 11 (1998) ("A corporation may also face prosecution under O.C.G.A. § 16-2-22(a)(1) for a crime if the statute defining the crime clearly indicates a legislative purpose to impose liability on a corporation. RICO, however, is not such a statute . . . .").

Although a corporation cannot be prosecuted directly under RICO, a corporation will be liable under Georgia RICO "if the 'crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment.'" *Clark*, 509 S.E.2d at 604 (quoting § 16-2-22(a)(2)). Whether the acts were performed at the request, command, or authorization of the board of directors or other managers is a question of proof at trial, not a sufficiency-of-the-pleading issue. *See State v. Military Circle Pet Center No. 94, Inc.*, 257 Ga. 388, 360 S.E.2d 248, 249 (1987) ("Although the state must prove the applicable provisions of [§ 16-2-22(a)(2)] at trial against a criminal defendant, it is not necessary that the state allege these provisions in the accusation.").

In this case, the plaintiffs' complaint alleges that "Mohawk supervisors have encouraged these [illegal-immigrant] employees to return to the United States and reapply for work at Mohawk in violation of United States law." Furthermore, "Mohawk also has knowingly and recklessly accepted proof of eligibility for employment documents that reflect successive different names for a single person." The plaintiffs' complaint is rife with allegations that supervisors and managers at Mohawk were either aware of, or in reckless disregard of, the misuse of various work-related documents. Consequently, the plaintiffs have alleged sufficient conduct that, if proven, would allow them to hold Mohawk liable under state law.

B. Standing to Pursue State-Law RICO Claims

As with Federal RICO claims, under Georgia's RICO statute, "[a]ny person who is injured by reason of any violation of" Georgia's RICO statute "shall have a cause of action for three times the actual damages sustained . . . ." O.C.G.A. § 16-14-6(c). "[B]ecause the state RICO act is modeled upon and closely analogous to the federal RICO statute," Georgia courts "look to federal authority" in determining RICO standing. *Maddox v. So. Engineering Co.*, 231 Ga.App. 802, 500 S.E.2d 591, 594 (1998) (quotation marks and citation omitted). We already have concluded that the plaintiffs have alleged sufficient injury to pursue their federal RICO claims, and accordingly, we conclude that they have alleged a sufficient injury to pursue their state RICO claims as well. Although under Georgia law the plaintiffs are limited to predicate acts arising out of 18 U.S.C. § 1546, we conclude that the plaintiffs' allegations are neither too remote nor too indirect to satisfy Georgia's proximate-cause requirement under state-law RICO. *See Maddox*, 500 S.E.2d at 594 ("In short, the language 'by reason of' imposes a proximate causation requirement on the plaintiff." (citation omitted)); *id.*

(A plaintiff "must show a causal connection between his injury and a predicate act." (citation omitted)).

IV. UNJUST ENRICHMENT

The plaintiffs' complaint claims that Mohawk's illegal conduct permits it "to reap substantial wage savings" because Mohawk pays plaintiffs lower wages than it would otherwise be forced to pay. Therefore, according to the plaintiffs' complaint, Mohawk has been unjustly enriched under state law. Plaintiffs also claim that Mohawk has been unjustly enriched because the hiring of illegal aliens has led to a reduced number of worker's-compensation claims. Both of plaintiffs' state-law unjust-enrichment claims fail.

Here, the plaintiffs were all paid an agreed-upon wage. In essence, the plaintiffs have a contract to work for the defendant and were paid the agreed-upon wage. In Georgia, "[u]njust enrichment is an equitable concept and applies when as a matter of fact there is no legal contract . . . ." *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 508 S.E.2d 646, 648 (1998) (quotation marks and citation omitted); *see Bonem v. Golf Club of Georgia, Inc.*, 264 Ga.App. 573, 591 S.E.2d 462, 467-68 (2003). In this case, there was a legal contract as a matter of fact (i.e., if the plaintiffs were not paid, they could sue for breach of the employment contract). *See, e.g., SurgiJet, Inc. v. Hicks*, 236 Ga.App. 80, 511 S.E.2d 194, 195 (1999); *Brazzeal v. Commercial Cas. Ins. Co.*, 51 Ga.App. 471, 180 S.E. 853, 853 (1935). Therefore, there can be no unjust enrichment. Consequently, the plaintiffs' unjust-enrichment claim as it related to Mohawk's purported savings from lower wages should have been dismissed.

As for plaintiffs' claims that hiring illegal workers resulted in fewer worker's-compensation claims, there is no reasonable allegation that this fact, even if true, is connected to the plaintiffs receiving lower wages. To put it another way, the fact that Mohawk may have increased profits by lowering the

number of worker's-compensation claims it paid is not related to what wages Mohawk paid the plaintiffs. Consequently, the district court correctly determined that the plaintiffs did not have standing to assert this claim.

V. CONCLUSION

For all the above reasons, we conclude that the district court properly denied Mohawk's Rule 12(b)(6) motion as it related to both the plaintiffs' federal and state RICO claims. Furthermore, the district court properly dismissed the plaintiffs' unjust-enrichment claim as it related to worker's compensation. However, the district court should have also dismissed the plaintiffs' unjust-enrichment claim as it related to the agreed-upon wages that plaintiffs received.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. GEORGIA
ROME DIVISION

No. CIV.A.4:04-CV-0003-H

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSON, individually and on behalf of a class,
Plaintiffs,

v.

MOHAWK INDUSTRIES, INC.,
Defendant.

April 12, 2004

ORDER

MURPHY, *District Judge*.

This is a class action alleging violations of the federal and Georgia Racketeer Influenced and Corrupt Organizations Acts ("RICO"). The case is before the Court on Defendant's Motion to Dismiss [25].

I. Background

A. The Parties

Plaintiffs are current and former hourly employees of Defendant who claim that Defendant's alleged employment and harboring of illegal aliens has depressed their wages. (Compl.¶ 1.) Plaintiffs Gale Pelfrey, Shirley Williams, Bonnie Jones, and Lora Sisson are citizens of Georgia and reside in the Northern District of Georgia. (*Id.* ¶¶ 5-8.) Plaintiffs Pelfrey, Williams, and Sisson are former hourly employees of Defendant. (Compl.¶¶ 5, 6, 8.) Plaintiff Jones is currently an

hourly employee of Defendant. (*Id.* ¶ 7.) Plaintiffs Pelfrey, Williams, Sisson, and Jones are eligible to be employed in the United States. (*Id.* ¶¶ 5-8.) Plaintiffs seek certification of a class consisting of all current and former employees of Defendant legally authorized to be employed in the United States who are or have been employed in hourly wage positions at any time since January 5, 1999, to the present (the "Class").[1] (*Id.* ¶ 39.)

Defendant is the second largest carpet and rug manufacturer in the United States. (Compl.¶ 2.) Defendant employs approximately 31,780 persons, most of whom are employed in Northwest Georgia. (*Id.*) Defendant owns or leases at least twenty-six facilities in Georgia. (*Id.*) Defendant is a Delaware corporation with its principal place of business in Calhoun, Georgia. (*Id.* ¶ 9.)

B. Plaintiffs' Allegations

Plaintiffs allege that Defendant has engaged in illegal hiring of persons who are not eligible for employment in the United States in an effort to keep costs of labor as low as possible. (Compl.¶ 14.) According to Plaintiffs, Defendant has accepted for employment and continues to employ workers that it knew or had reason to know were not authorized to work in the United States. (*Id.* ¶ 15.) Plaintiffs allege that Defendant has knowingly and recklessly accepted false documents or documents that do not match the identity of the person presenting the documents as proof of eligibility for employment. (*Id.* ¶ 16.) Additionally, Plaintiffs claim that Defendant has knowingly and recklessly accepted proof of eligibility for employment documents reflecting successive different names for a single person. (*Id.* ¶¶ 17, 19.) Indeed,

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[1] Plaintiffs' Complaint also sets forth a number of allegations relating to the certification of a class of Defendant's former and current hourly employees. (*See* Compl. ¶¶ 39-53.) Those allegations are not relevant to the instant Motion.

Plaintiffs allege that when some illegal workers have informed Defendant that they would return to their countries of origin, supervisors employed by Defendant have encouraged those employees to return to the United States and illegally reapply for work at Defendant. (*Id.* ¶ 18.)

Plaintiffs claim that in an effort to conceal Defendant's employment and harboring of illegal workers, Defendant's employees have destroyed eligibility documents indicating that workers have employed different names and identification papers. (Compl.¶ 20.) Furthermore, according to Plaintiffs, Defendant's employees and supervisors have stated that they are aware that illegal workers can easily obtain false identification and work authorization documents. (*Id.* ¶ 21.)

Plaintiffs claim that Defendant's employees have traveled to the United States border to recruit illegal aliens. (Compl. ¶ 22.) According to Plaintiffs, those employees and other persons then transported the illegal aliens to North Georgia for employment at Defendant's facilities. (*Id.*) Plaintiffs allege that Defendant has provided incentive to its employees and other recruiters by paying for locating illegal workers that Defendant eventually employs and harbors. (*Id.*) Plaintiffs contend that Defendant's employees and recruiters have provided housing for illegal workers when the workers arrived in North Georgia, and have aided those illegal workers in finding employment with Defendant. (*Id.* ¶ 23.)

Occasionally, Defendant audits its workforce and discovers illegal workers are employed with Defendant. (Compl.¶ 24.) According to Plaintiffs, Defendant has not increased the frequency of such audits despite the fact that the audits reveal that a large number of illegal workers are employed at Defendant. (*Id.*) Furthermore, Plaintiffs allege that when Defendant terminates an illegal worker after discovering that the illegal worker is not authorized to work in the United States, the worker frequently returns to work under a different name. (*Id.* ¶ 25.) Plaintiffs claim that this practice, termed

"recycling," is widespread at Defendant. (*Id.* ¶ 26.) According to Plaintiffs, Defendant has been further put on notice of illegal workers because many illegal workers artificially inflate their claimed exemptions, thus avoiding paying federal income tax. (*Id.* ¶ 32.)

Plaintiffs allege that law enforcement authorities have raided Defendant's facilities in search of illegal workers. (Compl.¶ 27.) Plaintiffs claim that when such raids have occurred, illegal workers have hidden in barrels or other containers or have fled. (*Id.*) According to Plaintiffs, the number of illegal workers who run or hide has put Defendant on notice that it employs a large number of illegal workers. (*Id.*) Moreover, Plaintiffs contend that Defendant's employees and supervisors have assisted illegal workers in evading the law enforcement authorities. (*Id.* ¶ 28.)

Plaintiffs state that law enforcement authorities have arrested some illegal workers at Defendant's facilities. (Compl.¶ 29.) Plaintiffs further allege that law enforcement authorities have discovered undocumented aliens in possession of paychecks issued by Defendant or identification badges and fraudulent identification documents. (*Id.* ¶ 30.)

According to Plaintiffs, Defendant's supervisors have stated that illegal workers are preferable because those workers are more tolerant of working conditions and do not submit claims for workers' compensation. (Compl.¶ 31.) Plaintiffs contend that because many of Defendant's workers are undocumented aliens, Defendant knows that those workers are beholden to Defendant, and thus are unlikely to complain about working conditions or file workers compensation claims. (*Id.* ¶¶ 36-37.) Consequently, Plaintiffs believe that Defendant saves a considerable amount of money by employing undocumented aliens. (*Id.* ¶ 37.)

According to Plaintiffs, Defendant's practice of employing and harboring large numbers of illegal workers has allowed

Defendant to depress wages; consequently, the wages paid to hourly employees, including the legally employed hourly employees who are members of the Class, are lower than those wages would be if Defendant did not employ and harbor illegal workers. (Compl.¶ 33.) Plaintiffs allege that Defendant employs tens of thousands of hourly workers in North Georgia (*id.* ¶ 34), and Defendant's widespread employment and harboring of illegal workers has substantially increased the supply of workers from which Defendant hires its hourly workers (*id.* ¶ 35). Plaintiffs contend that because of the increased size of the labor pool, Defendant has depressed the wages it pays to all of its hourly employees, including members of the Class. (*Id.*) In other words, Plaintiffs claim that Defendant had only hired persons legally authorized to work in the United States, Defendant would have had to pay higher wages to Plaintiffs and the members of the Class. (*Id.*) Thus, according to Plaintiffs, as a direct and proximate result of Defendant's employment and harboring of illegal workers, the wages that Plaintiffs and the members of the Class have earned have been depressed.

C. Plaintiffs' RICO Claims

1. Pattern of Racketeering Activity

Plaintiffs first allege that Defendant is engaged in an ongoing pattern of racketeering activity as defined by 18 U.S.C.A. § 1961(5) & (8). (Compl.¶¶ 54, 56.) According to Plaintiffs, Defendant has engaged in racketeering activity, namely, an open and ongoing pattern of violations of Section 274 of the Immigration and Nationality Act, 8 U.S.C.A. § 1324(a), more than twice, and the most recent occurrence took place within ten years after the commission of a prior act of racketeering activity. (*Id.* ¶ 55, 57, 58.) In particular, Plaintiffs allege that Defendant has violated and continues to violate: (1) 8 U.S.C.A. § 1324(a)(3)(A), which makes it a federal crime to "knowingly hire[ ] for employment at least 10 individuals with actual knowledge that the individuals are

aliens" during a twelve month period (*id.* ¶ 59); (2) 8 U.S.C.A. § 1324(a)(1)(A)(iii), which makes it a federal crime to "conceal[ ], harbor[ ] or shield from detection, or attempt[ ] to conceal, harbor or shield from detection" aliens that have illegally entered the United States (*id.* ¶ 60); and (3) 8 U.S.C.A. § 1324(a)(1)(A)(iv), which makes it a federal crime to "encourage[ ] or induce[ ] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law" (*id.* ¶ 61). Plaintiffs contend that each violation of 8 U.S.C.A. § 1324 constitutes an act of "racketeering activity" as defined by 18 U.S.C.A. § 1961(1)(F). (*Id.* ¶ 62.)

According to Plaintiffs, the "racketeering activity" also includes Defendant's open and ongoing violations of 18 U.S.C.A. § 1546(a) by knowingly accepting various false identification documents and other false documents indicating authorization for legal employment, and Defendant's continued violations of 18 U.S.C.A. § 1546(b) by using such documents to fill out I-9 forms. (Compl.¶¶ 63-64.) Plaintiffs allege that each violation of 18 U.S.C.A. § 1546 constitutes an act of "racketeering activity" as defined by 18 U.S.C.A. § 1961(1)(B) as well as O.C.G.A. § 16-14-3(9)(A)(xxix). (*Id.* ¶¶ 65-66.)

Plaintiffs claim that the acts of Defendant's racketeering activity have the same or similar methods of commission in that those acts involve the knowing employment of illegal workers, the concealment, harboring, and shielding from detection of illegal workers, and the acceptance or use of fraudulent documents in connection with the hiring of illegal workers. (Compl.¶ 67.) According to Plaintiffs, the acts of racketeering activity have the same or similar objective—*i.e.* the reduction of wages paid to Defendant's workforce. (*Id.* ¶ 68.) Plaintiffs allege that the victims of those acts of racketeering activity are the same or similar. (*Id.* ¶ 69.)

Plaintiffs also contend that the distinguishing characteristics of the acts of racketeering activity include the involvement of Defendant, illegal workers, and other third parties who assist in the recruitment and transportation of undocumented aliens. (*Id.* ¶¶ 70, 76-84.)

According to Plaintiffs, those acts of racketeering activity have occurred over a long period of time, and have become a part of Defendant's regular way of doing business. (Compl.¶¶ 71-73.) Plaintiffs assert that Defendant has committed hundreds, and perhaps thousands, of violations of 8 U.S.C.A. § 1324 and 18 U.S.C.A. § 1546 as part of its racketeering activity. (*Id.* ¶ 74.) Indeed, Plaintiffs claim that Defendant's racketeering activity has been so pervasive that illegal workers currently constitute a majority of the workforce in many of Defendant's facilities in North Georgia. (*Id.* ¶ 75.)

2. Enterprise

Plaintiffs also allege that Defendant has engaged in its pattern of racketeering activity through its participation in an association-in-fact enterprise, as defined by 18 U.S.C.A. § 1961(4), with third party employment agencies and other recruiters who supply Defendant with illegal workers. (Compl.¶¶ 76, 79.) Plaintiffs claim that one such recruiter is Temporary Placement Services ("TPS"), which has a formal relationship with Defendant in that TPS employs illegal workers and then loans those workers to Defendant for a fee. (*Id.*) According to Plaintiffs, other recruiters simply find workers in an area surrounding Brownsville, Texas, and then transport those workers to Georgia. (*Id.*) Plaintiffs contend that TPS and other recruiters also occasionally assist current and prospective illegal workers in assuming new identities. (*Id.*) Plaintiffs allege that those recruiters share the common purpose of obtaining illegal workers for employment with Defendant. (*Id.* ¶ 77.) Additionally, Plaintiffs contend that Defendant participates in the operation and management of

the affairs of the enterprise, which exists for Defendant's benefit. (*Id.* ¶ 78.)

Plaintiffs allege that the enterprise affects interstate commerce in that the illegal workers employed by Defendant travel in international and interstate commerce to reach Defendant's facilities in North Georgia. (Compl.¶¶ 80, 81.) According to Plaintiffs, the enterprise also affects interstate commerce in that the wages of legal workers employed with Defendant are depressed. (*Id.* ¶ 82.) Furthermore, Plaintiffs state that because Defendant is a member of the enterprise and is directly engaged in the production, distribution, and acquisition of goods and services in interstate commerce, the enterprise affects interstate commerce. (*Id.* ¶ 83.)

According to Plaintiffs, Defendant, by accepting and retaining the benefits of the racketeering activity, ratified the conduct of Defendant's managers, employees, and the members of the enterprise who assisted Defendant in committing those acts of racketeering activity. (*Id.* ¶ 84.)

3. Causation

Plaintiffs next allege that Defendant's violations of federal and Georgia RICO proximately caused the wages of Plaintiffs and the members of the Class to be lower than their wages otherwise would have been had the labor pool consisted solely of legally employed workers. (Compl.¶ 85.) Thus, Plaintiffs and the Class claim that they have suffered an injury to their business or property. (*Id.* ¶ 86.) As a result, Plaintiffs contend that Defendant has earned or retained significant funds to which it is not entitled. (*Id.* ¶ 87.)

D. Procedural Background

On January 6, 2004, Plaintiffs filed this lawsuit. Plaintiffs assert the following claims: (1) a claim that Defendant's conduct violates 18 U.S.C.A. § 1962(c) (Compl. ¶¶ 88-92); (2) a claim that Defendant's conduct violates O.C.G.A.

§ 16-14-4(a) (*id.* 93-98); (3) a claim that Defendant's conduct violates O.C.G.A. § 16-14-4(c) (*id.* 99-105); and a claim for unjust enrichment arising under Georgia law (*id.* ¶¶ 106-110). Plaintiffs also seek certification of a class pursuant to Federal Rule of Civil Procedure 23. (*Id.* ¶ 46.)

On February 9, 2004, Defendant filed its Motion to Dismiss pursuant to Federal Rules of Civil Procedure (12)(b)(6) and (12)(b)(1),[2] in which Defendant requests that the Court dismiss Plaintiffs' federal and state RICO claims. Defendant also requests that the Court decline to exercise its pendent jurisdiction over Plaintiffs' state law claims.

II. Standard Governing Motions to Dismiss

The standard for a court to dismiss a claim is whether "it appears beyond doubt that the plaintiff can prove no set of facts to support his claim." *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510 (11th Cir.1993) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). When considering a motion to dismiss, the Court "must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiffs." *White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir.1999). However, "[a]s a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss." *S. Fla.*

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[2] Defendant moves to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) only with respect to the elements of 18 U.S.C.A. § 1964(c), which provides the requirements for a plaintiff to have standing to pursue a civil private right of action under RICO. Apparently, some question exists as to whether a motion to dismiss under § 1964(c) is properly characterized as a 12(b)(6) motion (*i.e.* failure to state a claim upon which relief can be granted) or a 12(b)(1) motion (*i.e.* lack of jurisdiction over the subject matter). *See Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169 n. 3 (2d Cir.1999) (applying 12(b)(6), but expressing belief that 12(b)(1) was more appropriate ground for dismissal). The Court appreciates the distinction between 12(b)(1) and 12(b)(6), but concludes that for the purposes of the instant Motion, an analysis under 12(b)(6) suffices.

Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 408 n. 10 (11th Cir.1996).

III. Discussion

A. Plaintiffs' Federal RICO Claim

18 U.S.C.A. § 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C.A. § 1962(c). RICO establishes both civil remedies and criminal penalties for violations of § 1962. *See* 18 U.S.C.A. §§ 1963-1964. In particular, § 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." 18 U.S.C.A. § 1964(c). Thus, for a plaintiff to have standing to pursue a private civil cause of action under RICO, the plaintiff must prove the following elements: (1) that the defendant violated § 1962; (2) that the plaintiff sustained an injury to his business or property; and (3) that the violation of § 1962 caused the injury. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir.1991) (citing *O'Malley v. O'Neill*, 887 F.2d 1557, 1560-61 (11th Cir.1989)). Likewise, to prevail on a civil RICO claim under § 1962(c), the plaintiff must show: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that the defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendant participated through a pattern of racketeering activity. *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir.1995).

18 U.S.C.A. § 1961 provides definitions for some of the terms used in § 1962(c). "Racketeering activity" includes a number of "predicate acts" that the racketeer must commit for a violation of RICO. 18 U.S.C.A. § 1961(1). Notably, violations of 8 U.S.C.A. § 1324 and 18 U.S.C.A. § 1546, the predicate acts that Plaintiffs allege Defendant committed, are among those predicate acts listed in § 1961(1). 18 U.S.C.A. § 1961(1)(B) & (F). A "pattern of racketeering activity" is defined as at least two acts of racketeering activity that occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C.A. § 1961(5); *see Pelletier v. Zweifel*, 921 F.2d 1465, 1496 (11th Cir.1991) ("A 'pattern' of racketeering activity is shown when a racketeer commits at least two distinct but unrelated predicate acts."). Section 1961 also provides that an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C.A. § 1961(4). Likewise, a "person" liable under § 1962(c) is defined as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C.A. § 1961(3).

Defendant contends that the Court should dismiss Plaintiffs' Complaint because: (1) the Complaint does not sufficiently allege the elements of the RICO predicate action; (2) the Complaint fails to identify a legally sufficient RICO enterprise; and (3) Plaintiffs lack standing to assert their RICO claims. The Court addresses each of those arguments in turn.

1. Sufficiency of Pleadings

a. Whether Plaintiffs Failed to Plead Predicate Acts with Particularity

As a threshold matter, the Court addresses Defendant's contention that Plaintiffs' Complaint fails to meet the heightened pleading requirements of Federal Rule of Civil Proce-

dure 9(b). When pleading a RICO action, it is well-settled that where the predicate act sounds in fraud (e.g. mail fraud, wire fraud, or securities fraud), the plaintiff must plead that predicate act with particularity as required by Federal Rule of Civil Procedure 9(b). *Byrne v. Nezhat*, 261 F.3d 1075, 1109-10 (11th Cir.2001) (mail fraud); *Republic of Panama v. BCCI Holdings (Lux.)*, 119 F.3d 935, 949 (11th Cir.1997) (wire fraud); *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380-82 (11th Cir.1997) (mail fraud and wire fraud); *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511-12 (11th Cir.1988) (securities fraud); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1251.1 n. 13 (citing cases finding that fraud claims brought under RICO must comply with pleading requirements of Rule 9(b)).

As the United States Court of Appeals for the Eleventh Circuit has not yet addressed whether the heightened pleading requirement of Rule 9(b) applies to RICO causes of action premised on non-fraud predicate acts, some ambiguity exists as to whether the particularized pleading requirements of Rule 9(b) apply in *all* RICO actions. *Compare Taylor v. Bear Stearns & Co.*, 572 F.Supp. 667, 682 (N.D.Ga.1983) (Forrester, J.) ("It seems, however, to this court at least that there are many sound reasons for requiring that, like fraud, [RICO] must be pled with particularity.") *and Helicopter Support Sys., Inc. v. Hughes Helicopters, Inc.*, No. 83-1450-Civ.-T-15, 1984 WL 3238, at *1 (M.D.Fla. June 22, 1984) (same) *with Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 945 F.Supp. 1355, 1380 n. 25 (D.Or.1996) (finding Rule 9(b) inapplicable where predicate acts are extortion and coercion); *and United States v. Int'l Bhd. of Teamsters*, 708 F.Supp. 1388, 1395-96 (S.D.N.Y. 1989) ("This court is not persuaded by the reasoning of the courts that have applied Rule 9(b) to RICO actions not sounding in fraud, and adopts the reasoning of courts that limit the application of Rule 9(b) to fraud based RICO

claims."); *and United States v. Bonanno Organized Crime Family of LaCosa Nostra*, 683 F.Supp. 1411, 1426-27 (E.D.N.Y.1988) (finding "no basis for extending the reach of Rule 9(b) to all RICO cases"). Those courts holding that Rule 9(b) applies in all RICO actions reason such heightened pleading is appropriate in light of the *in terrorem* effect of pleading RICO and in order to put the RICO defendant on notice of the claim against him. *See Taylor*, 572 F.Supp. at 682 ("First, the mere invocation of the statute has such an *in terrorem* effect that it would be unconscionable to allow it to linger in a suit and generate suspicion and unfavorable opinion of the putative defendant unless there is some articulable factual basis which, if true, would warrant recovery under the statute. Second, the concepts within the statute are so nebulous that if the cause of action were only generally pled, a defendant would have no effective notice of a claim showing that the pleader is entitled to relief.")

Plaintiffs urge the Court to find that the appropriate pleading standard for non-fraud RICO predicate activities is the standard provided in Rule 8(e)(1). *See* Fed. R. Civ. Proc. 8(e)(1) ("Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."). Specifically, Plaintiffs contend that the reasoning underlying *Taylor* is inapplicable in light of *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). In *Sedima,* the United States Supreme Court held that a plaintiff in a RICO action need not allege and prove that the defendant had previously been convicted under RICO. 473 U.S. at 492, 105 S.Ct. 3275. In reaching that conclusion, the Supreme Court dismissed the argument that a RICO conviction should be required to pursue a civil RICO action, stating, "[a]s for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings." *Id.* Plaintiffs urge the Court to conclude that in light of the foregoing language from *Sedima*, Rule 9(b) is limited to cases that actually involve fraud or

mistake, and does not apply in every case where the defendant claims it is stigmatized.

The Court finds Plaintiffs' reasoning persuasive, and finds that the better approach, and certainly the majority approach, is to apply the liberal pleading standards of Rule 8 to RICO actions involving non-fraud predicate activities. Additionally, the Court notes *Taylor* and *Helicopter Support Sys.* are distinguishable because the predicate activities in those cases were mail fraud and wire fraud, rather than a non-fraud predicate act.[3] Accordingly, the Court finds that where a predicate act does not sound in fraud, the plaintiff asserting a RICO claim need only comply with the general pleading requirements of Rule 8(e)(1), rather than the heightened pleading requirements of Rule 9(b).[4]

Having determined that Rule 9(b) is inapplicable in cases involving non-fraud RICO actions, the Court next addresses Defendant's argument that the predicate acts enumerated in Plaintiffs' Complaint sound in fraud, and must therefore be pled with particularity. In support of its position, Defendant cites to a string of criminal cases where courts referred to the predicate acts alleged in the instant lawsuit as "acts of fraud."

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[3] In *Helicopter Support Sys.*, the plaintiff also asserted a claim for commercial bribery. *Helicopter Support Sys.* at *1. The court found that the plaintiff failed to show that commercial bribery was a predicate offense under § 1961(1); thus, it was unnecessary to address whether that offense required heightened pleading under Rule 9(b). *Id.*

[4] Defendant's reliance on *Club Car, Inc. v. Club Car Import, Inc.* 276 F.Supp.2d 1276 (S.D.Ga.2003), is misplaced. In that case, the plaintiff was required to plead predicate acts of extortion and mail fraud with particularity simply because Local Rule 9.1 for the United States District Court for the Southern District of Georgia requires such specificity. *See* L.R.S.D. Ga. 9.1 ("All pleadings which allege violations of . . . , RICO, and other similar statutes, whether federal or state, shall specifically state each alleged violation.") This Court, however, has no such provision in its Local Rules. Consequently, the Court does not find *Club Car* applicable in this case.

See, e.g., United States v. Rodriguez-Suazo, 346 F.3d 637 (6th Cir.2003); *United States v. Thiongo*, 344 F.3d 55, 58 (1st Cir.2003); *United States v. Hendricks*, No. 99-4562, 2000 WL 341914, at *2 (4th Cir. Apr.3, 2000); *United States v. Yum*, 776 F.2d 490, 491 (4th Cir.1985). Those cases, however, do not require a finding that the predicate acts based on violations of 8 U.S.C.A. § 1324(a) and 18 U.S.C.A. § 1546 sound in fraud. The cases relied upon by Defendant involve defendants who were charged with making false representations, or conspiring to make false representations, to the federal government. By contrast, Plaintiffs do not allege that Defendant made false representations to Plaintiffs or the government; rather, Plaintiffs allege that Defendant has employed and harbored illegal workers. The predicate acts in this case consequently do not sound in fraud. Because the predicate acts in this case do not sound in fraud, the Court finds that Rule 9(b) is inapplicable to this case. Instead, Plaintiffs need only satisfy the requirements of Federal Rule of Civil Procedure 8.

The Court further notes that it has evaluated the Complaint, and finds that it satisfies the requirements set forth in Rule 8. Accordingly, the Court cannot dismiss the Complaint on the ground that Plaintiffs failed to plead the predicate acts adequately.

b. Whether Plaintiffs Failed to Allege All the Elements Required to Plead a Violation of 8 U.S.C.A. § 1324(a)(3)

Defendant also contends that Plaintiffs have failed to plead sufficiently the violation of 8 U.S.C.A. § 1324(a)(3), one of the predicate acts alleged in the Complaint. Specifically, Defendant claims that the Complaint fails to allege all the required elements of § 1324(a)(3), which provides:

> (A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens

> described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.
>
> (B) An alien described in this subparagraph is an alien who—
>
> (i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and
>
> (ii) has been brought into the United States in violation of [8 U.S.C.A. § 1324(a)].

8 U.S.C.A. § 1324(a)(3). Defendant contends that to plead a violation of § 1324(a)(3) adequately, Plaintiffs must allege that Defendant knowingly hired ten or more aliens and that Defendant *itself* brought those aliens into the United States.

In support of its position, Defendant relies on *System Management, Inc. v. Loiselle*, 91 F.Supp.2d 401 (D.Mass. 2000). The Court, however, does not agree that the holding of *Loiselle* is as limited as Defendant insists. In *Loiselle*, the defendant owner and chief executive officer of a janitorial and custodial services company was sued by two competitor corporations and four former employees. *Loiselle*, 91 F.Supp.2d at 404. The plaintiffs alleged that the defendant had violated RICO by engaging in racketeering activity including "knowingly hiring at least ten individuals with knowledge that they were 'aliens' as described in 8 U.S.C. § 1324(a)(3)(A)." *Id.* at 408. The defendant argued, and the court agreed, that the RICO claim premised on § 1324(a)(3) should be dismissed because the plaintiffs failed to allege "how the aliens entered the country or whether [the defendant] had knowledge of the purpose for which they entered." *Id.* The court reasoned that the language of § 1324(a)(3)(B)(ii) "seems to require, in order for liability to attach, that the aliens have been brought into the country by *an* employer for the purpose of illegal employment." *Id.* In other words, "the Plaintiffs must allege that [the defendant] had knowledge of how the aliens had been brought into the

United States and that they were *brought* into the United States in violation of this employment provision." *Id.* Thus, *Loiselle* holds that simple allegations that the defendant knowingly hired undocumented aliens are insufficient to state a claim under § 1324(a)(3); rather, a plaintiff must additionally allege that the defendant knew that the aliens were brought into the United States for the purpose of illegal employment. *Loiselle,* however, did not hold that the employer *itself* must have brought the aliens into the United States for a claim to arise under § 1324(a)(3). Accordingly, the Court concludes that for a plaintiff to plead a violation of § 1324(a)(3) adequately, the plaintiff must simply allege that the aliens were *brought* into the United States in violation of subsection (a), but there is no requirement that the employer must have brought the aliens into this country.

Turning to the Complaint, the Court concludes that Plaintiffs have pleaded adequately the elements of § 1324(a)(3). Specifically, Plaintiffs have alleged that Defendant has hired illegal workers knowing that those workers were "smuggled or otherwise brought" into the United States illegally. (Compl.¶ 59.) *See Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at *4 (E.D.Wash. Sept. 27, 2000) (finding "the plaintiffs have adequately pled a predicate act . . . by alleging that the defendants knew that some of their workers were unlawfully brought into the United States"). Accordingly, the Court denies Defendant's Motion to Dismiss as to this ground.

2. Enterprise

The Court next determines whether the Complaint adequately alleges the existence of a RICO enterprise. Defendant contends that Plaintiffs' Complaint fails as a matter of law to allege that a RICO enterprise existed and that the Court thus must dismiss Plaintiffs' Complaint. Specifically, Defendant claims: (1) that Plaintiffs have not and cannot allege that Defendant participated in the affairs of a RICO enter-

prise, rather than its own affairs, through the alleged immigration law violations; (2) that Plaintiffs have failed to allege a RICO enterprise distinct from Defendant; and (3) that Plaintiffs have failed to allege the existence of a common purpose and unified structure.

As explained *supra* Part III.A., a RICO "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity," 18 U.S.C.A. § 1961(4), and a RICO "person" is "any individual or entity capable of holding a legal or beneficial interest in property," 18 U.S.C.A. § 1961(3). "For the purposes of [§ 1962(c)], the indictment [or complaint] must name a RICO person distinct from the RICO enterprise. The plain language of the statute requires that [those] entities be distinct." *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1271 (11th Cir.2000) (hereinafter "*Goldin I*"). The Eleventh Circuit does not require a strict, formal association of participants; rather, "the existence of an enterprise 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir.2000) (hereinafter "*Goldin II*") (quoting *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). "[T]he definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity requisite to the RICO violation." *Id.; United States v. Elliott*, 571 F.2d 880, 897-98 (5th Cir.1978);[5] *see also United States*

[5] Opinions of the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the Eleventh Circuit, are binding precedent on this Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209-11 (11th Cir.1981) (en banc).

v. Hawes, 529 F.2d 472, 479 (5th Cir.1976) (recognizing that Congress gave the term "enterprise" a very broad meaning). Indeed, "a RICO enterprise may be an 'amoeba-like' structure or a loose informal association." *Avirgan v. Hull*, 932 F.2d 1572, 1578 (11th Cir.1991) (citing *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir.1983)).

Notably, the existence of an enterprise is a separate element that the plaintiff must prove—*i.e.* although a pattern of racketeering activity must be shown by pointing to evidence of the requisite number of racketeering acts by participants in the enterprise, such evidence does not necessarily establish the existence of an enterprise. *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524. Indeed, "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart form the pattern of activity in which it engages." *Id.* Nevertheless, the Eleventh Circuit recognizes that "under our case law, a RICO enterprise need not possess an 'ascertainable structure' distinct from the associations necessary to conduct the pattern of racketeering activity." *Goldin II*, 219 F.3d at 1274-75 (quoting *United States v. Weinstein*, 762 F.2d 1522, 1537 n. 13 (11th Cir.1985)).

In support of its position that the Complaint fails to allege the existence of an enterprise adequately, Defendant relies heavily on a similar opinion issued by the Seventh Circuit, *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir.2004). In *Baker*, unionized current and former employees of one of the defendant's meat-processing plants filed a class action lawsuit on behalf of all current and former hourly employees at that plant who were authorized to work in the United States. *Baker*, 357 F.3d at 686. Specifically, the complaint in *Baker* alleged that nearly half of the employees at the defendant's plant were aliens who were unauthorized to work legally in the United States. *Id.* The plaintiffs claimed that the defendant turned a blind eye to bogus identification documents, alerted its illegal workers when immigration officials were

about to conduct inspections, and paid recruiters to smuggle captured illegal workers back into the United States for re-employment under pseudonyms. *Id.* at 687. The complaint further alleged that the defendant had arrangements with immigrant welfare organizations, who referred known undocumented aliens to the defendant for employment. *Id.* Plaintiffs alleged that as a result of that activity, wages at the defendant's plant were depressed compared with what the defendant would have had to pay if the labor pool consisted only of persons legally authorized to work in the United States. *Id.*

In affirming the district court's dismissal of the complaint, the Seventh Circuit first concluded that the union representing the plaintiffs was the proper representative with respect to the wages issue rather than the employees individually. The court also concluded that "there [was] another fatal problem in [the] complaint: specification of the 'enterprise.'" *Baker*, 357 F.3d at 691. The complaint alleged that the "enterprise" was the defendant plus the persons and organizations who assisted the defendant in recruitment of illegal workers. The court first noted that the complaint came "perilously close to alleging that [the defendant] plus its agents and employees is the 'enterprise,' a theory that won't fly." *Id.* (citing *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir.2003)).

The court also found that the complaint was flawed for failure to identify a common purpose: "it is not altogether clear how this 'association in fact' has a common purpose, an essential ingredient." *Id.* (citing *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524). The court took a conservative reading as to whether the members of the "association in fact," had a common purpose concluding that their goals were divergent because the defendant wanted to pay lower wages, the recruiters wanted to be paid for their recruitment services, and the immigrant welfare organizations wanted to assist mem-

bers of the ethnic group. *Id.* Consequently, the court found that no common purpose existed. *Id.*

Finally, the *Baker* court found that the plaintiffs failed to allege that the defendant operated or managed the purported enterprise through a pattern of racketeering. *Baker*, 357 F.3d at 692. The court explained that the complaint was insufficient because "[t]he nub of the complaint [was] that [the defendant] operate[d] itself unlawfully—it is [the defendant] that supposedly hires, harbors, and pays the unlawful workers, for the purpose of reducing its payroll." *Id.* at 361. Specifically, the court stated that "[the defendant] does not manage or operate some other enterprise by violating [8 U.S.C.A. § 1324]; the complaint does not allege—and on appeal plaintiffs do not seek an opportunity to show—that [the defendant] ha[d] infiltrated, taken over, manipulated, disrupted, or suborned a distinct entity or even a distinct association in fact." *Id.* The Court therefore found that the plaintiffs failed to allege that the defendant operated an enterprise through a pattern of racketeering activity. *Id.*

Turning to the instant case, the Court first considers Defendant's argument that Plaintiffs have failed to allege that Defendant operated or participated in the affairs of an enterprise through a pattern of racketeering activity. Specifically, Defendant contends that Plaintiffs have failed to allege that Defendant, through its allegedly illegal conduct, operated or participated in the affairs of an "association in fact" as opposed to Defendant's own affairs. In support of its position, Defendant points to various paragraphs in the Complaint that allege that Defendant, as opposed to the purported enterprise, harbored and employed illegal workers in order to reduce the cost of its workforce. (*See Compl.* ¶¶ 3, 14, 16-18, 59-61; 63-64, 67.)

In response, Plaintiffs argue that the Complaint alleges that Defendant "participates in the affairs of an enterprise that transcends [Defendant] itself and that consists of [Defendant]

and various other persons and entities." (Def. Br. Resp. at 7 (emphasis deleted).) Specifically, Plaintiffs point to the following language in the Complaint:

> Mohawk has engaged in an open and ongoing pattern of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 during the last five years through its participation in an association-in-fact enterprise with third party employment agencies and other recruiters, including Temporary Placement Services ("TPS"), that supply Mohawk with illegal workers. Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity.

(Compl.¶ 76.) Plaintiffs maintain that given the nature of an association-in-fact enterprise, it is to be expected that the defendant will be engaged in the management of its own affairs—what is most important, however, is that the defendant also participates in the affairs of an enterprise.

Defendant correctly asserts that "liability 'depends on showing that the defendants conducted or participated in the conduct of the enterprises's affairs, not just their own affairs.'" *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993)) (internal quotation omitted) (em-

phasis deleted). The Eleventh Circuit has nevertheless recognized that "the definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate acts." *Goldin II*, 219 F.3d at 1275; *Weinstein*, 762 F.2d at 1537. Here, the Complaint alleges that Defendant participated in the conduct of an enterprise's affairs by paying recruiters for illegal workers and by maintaining a formal relationship with TPS, and that those parties, as an association-in-fact, provided the means for the commission of a number of immigration law violations. Consequently, the Court finds that Plaintiffs' Complaint sufficiently alleges that Defendant operated or participated in the affairs of an enterprise through a pattern of racketeering activity.

The Court next addresses whether Plaintiffs have failed to allege an enterprise distinct from Defendant itself. Although the Complaint clearly alleges that the other members of the alleged enterprise are independent third parties rather than employees or agents of Defendant (Compl.¶ 76.), Defendant urges the Court to follow *Baker,* and to find that the Complaint fails to allege the existence of an enterprise.

At this stage in the litigation, however, the Court need only determine whether the Complaint sufficiently alleges the existence of an enterprise separate from Defendant. After consideration of the allegations in the Complaint, the Court concludes that for the purposes of this Motion to Dismiss, Plaintiffs have adequately alleged that the recruiters are separate and independent entities from Defendant. Whether the third party recruiters are in fact agents of Defendant is a factual issue, but for the purposes of the instant Motion Plaintiffs have met their burden to allege that the association-in-fact enterprise consisted of Defendant and separate entities. *See Cedric Kushner Promotions*, 533 U.S. at 164, 121 S.Ct. 2087 (citing *Riverwoods Chappaqua Corp. v. Marine Mid-*

land Bank, N.A., 30 F.3d 339, 344 (2d Cir.1994)); *In re Managed Care Litig.*, 298 F.Supp.2d 1259, 1276-77 (S.D.Fla.2003) (finding complaint sufficiently alleged control and participation in association-in-fact enterprise). *Cf. Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir.1997) ("[W]here a large, reputable manufacturer deals with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is entirely incidental, differing not at all from what it would be if these agents were the employees of a totally integrated enterprise, the manufacturer plus its dealers and other agents . . . do not constitute an enterprise within the meaning of [RICO]."). Accordingly, the Court cannot conclude that Plaintiffs have failed to allege the existence of an enterprise district from Defendant itself.

Defendant next argues that Plaintiffs have failed to allege the existence of an enterprise because the Complaint does not adequately allege the existence of a common purpose among the members of the association-in-fact. Specifically, Defendant claims that rather than alleging a common purpose between Defendant and the recruiters, Plaintiffs' Complaint indicates that the members of the purported enterprise had divergent goals and purposes. (*See* Compl. ¶ 22 ("Mohawk has made various incentive payments to employees and other recruiters for locating workers that Mohawk eventually employs and harbors.").) Defendant therefore contends that as a matter of law, no enterprise exists. Defendant cites to the following language in *Baker* in support of its argument: "[the employer] wants to pay lower wages; the recruiters want to be paid more for services rendered (though [the employer] would like to pay them less); and the [immigrant welfare organizations] want [ ] to assist members of [their] ethnic group." *Baker* 357 F.3d at 691. Thus, because the members of the enterprise have divergent goals, Defendant concludes that no association-in-fact enterprise exists.

Plaintiffs respond that in this case, the members of the enterprise indeed share a common purpose namely, "the common purpose of obtaining illegal workers for employment by Mohawk." (Compl.¶ 77.) Moreover, Plaintiffs maintain that no authority exists in the Eleventh Circuit for the proposition that divergent individual goals of persons in a purported association-in-fact enterprise precludes the existence of such enterprise as a matter of law.

The Eleventh Circuit takes a broad approach as to what qualifies as an enterprise. *See United States v. Hewes*, 729 F.2d 1302, 1310-12 (11th Cir.1984) (upholding jury determination that "'informal, de facto association' existed among the defendants that united them in the common purpose of making money from repeated criminal activity") (quoting *Elliott*, 571 F.2d at 898); *Cagnina*, 697 F.2d at 921-922 (finding evidence sufficient to support jury's finding of enterprise where common purpose of making money existed). Because the Complaint in this case explicitly alleges that a common purpose exists—obtaining illegal workers for employment by Defendants—the Court cannot agree with Defendant that Plaintiffs' Complaint is deficient.

In sum, the Court finds that the Complaint adequately sets forth allegations concerning the existence of an enterprise. Specifically, Plaintiffs have sufficiently alleged that Defendant participated in the affairs of a RICO enterprise as opposed to its own affairs, that a RICO enterprise exists distinct from Defendant, and that a common purpose and unified structure exists among the participants in the purported enterprise. Consequently, the Court denies Defendant's Motion to Dismiss on the ground that the Complaint fails to allege the existence of an enterprise.

3. Standing Under RICO

Defendant also argues that Plaintiffs do not have standing to sue because (1) Plaintiffs failed to allege injury to a con-

crete interest in business or property; and (2) Plaintiffs can not show that Defendant's alleged violations of 8 U.S.C.A. § 1324 proximately caused Plaintiffs' injuries. The Court discusses each of those arguments in turn.

a. Whether Plaintiffs Have Alleged Injury to their "Business or Property"

The Court turns first to whether Plaintiffs have alleged an injury to their business or property. Defendant argues that each Plaintiff accepted employment with Defendant at an agreed-upon wage rate, and that Plaintiffs cannot allege an injury to their business or property because Defendant paid each Plaintiff in accordance with those wage rates. In other words, Defendant claims that because it compensated Plaintiffs as the parties agreed, no injury has occurred, and Plaintiffs thus lack standing to pursue this action.

The Court cannot agree that as a matter of law Plaintiffs have failed to allege an injury to their business or property. The premise of Defendant's argument is that Defendant and Plaintiffs were able to bargain freely on a fair wage rate; however, assuming that Plaintiffs have been injured by reason of Defendant's alleged racketeering activities, the presence of illegal workers in the labor pool adversely has affected Plaintiffs' ability to command higher wage rates. In other words, if Plaintiffs are correct regarding issues of causation, Plaintiffs had no power to command higher wage rates due to the influx of illegal workers. Consequently, Plaintiffs' acceptance of lower wages could not act as a waiver of their alleged injuries. *See Mendoza*, 301 F.3d at 1168 n. 4. ("[W]hat is required is precisely what the employees allege here: a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes."). Thus, the Court cannot agree with Defendant that Plaintiffs have failed, as a matter of law, to allege an injury to Plaintiffs' business or property. The Court therefore cannot find that Plaintiffs lack standing based on this argument.

b. Whether Plaintiffs Have Alleged Injury "By Reason of" a Violation of § 1962(c)

Defendant further argues that Plaintiffs have not alleged an injury "by reason of" a violation of § 1962(c) and that Plaintiffs consequently cannot show that Defendant's alleged violations caused Plaintiffs' injuries. Section 1964(c) requires a plaintiff to show that he sustained injury "by reason of" the defendant's violation of § 1962. The Supreme Court, in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), held that the "by reason of" language of § 1964(c) requires a showing of both direct and proximate causation. 503 U.S. at 268-69, 112 S.Ct. 1311. "In order for a pattern of racketeering activity to be a cognizable cause of civil RICO injury to a private plaintiff, one or more of the predicate acts must not only be the 'but for' cause of the injury, but the proximate cause as well." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir.2003) (citing *Holmes*, 503 U.S. at 268, 112 S.Ct. 1311). Thus, for a plaintiff to have standing under RICO, he must allege and prove that "'his injury flowed directly from the commission of the predicate acts.'" *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir.1998) (quoting *Pelletier*, 921 F.2d at 1499).

In analyzing whether a plaintiff has adequately alleged an injury "by reason of" a violation of § 1962(c), the Supreme Court in *Holmes* recognized that "'the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.'" *Holmes*, 503 U.S. at 272 n. 20, 112 S.Ct. 1311 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (footnote omitted)). Thus, "use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by

the [policy] considerations set out in the text [of the *Holmes* opinion]." *Id.* In conducting proximate cause analysis under RICO, a court must therefore consider the following policy considerations on a case-by-case basis: (1) whether other parties are in a more suitable position to vindicate the law—*i.e.* whether the plaintiff is the direct victim of the alleged illegal conduct; (2) whether the court can identify a method to apportion possible recoveries; and (3) whether the damages alleged by the plaintiff are too speculative, that is, whether the court has the ability to identify what portion of the plaintiff's damages arose from the defendant's alleged RICO violations as opposed to other independent conditions. *Id.* at 273, 112 S.Ct. 1311.

In its Motion to Dismiss, Defendant first contends that Plaintiffs cannot show, and thus cannot allege, that Plaintiffs are the direct victims of Defendant's alleged wrongdoing, and that Plaintiffs consequently are not the best-suited persons to maintain this action. Defendant next contends that Plaintiffs' theory of damages is simply too speculative to support a finding that Defendant's conduct proximately caused Plaintiffs' injuries.[6] The Court addresses each of those arguments in turn.[7]

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[6] Defendant does not contend that other parties are better-situated to vindic- .e the aims of RICO. Because the Court concludes that Plaintiffs' injuries, as alleged, are not derivative of injury to a third party, the Court sees no reason why a party other than Plaintiffs should instead pursue this action.

[7] As an initial matter, the Court addresses Defendant's argument that Plaintiffs have standing as to pursue their federal RICO action only as to the predicate act of employing illegal workers. Specifically, Defendant claims that because Plaintiffs cannot show that the predicate acts of harboring and transporting illegal aliens and the use and acceptance of fraudulent documents caused injury to Plaintiffs, Plaintiffs lack standing with respect to those predicate acts.

The Eleventh Circuit has stated that "[i]f no injury flowed from a particular predicate act, no recovery lies for the commission of that act."

i. Direct Injury

In the instant action, Defendant first claims Plaintiffs lack standing because the legally authorized hourly workers constituting the putative class are not the direct victims of Defendant's alleged pattern of racketeering activity—*i.e.* Plaintiffs are not the best persons to vindicate RICO. Defendant relies primarily on *Holmes* for the proposition that where a plaintiff's injury is derived from a direct injury to a third party, that plaintiff lacks standing to bring an action pursuant to RICO for such "passed-on" injury. Defendant argues that Plaintiffs are not the "first victims" of Defendant's alleged immigration law violations; rather, the direct victims are the undocumented aliens who, because of their status, cannot command equal wages or enjoy equal benefits, such as workers' compensation.

Plaintiffs cite *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir.2002), in which the Ninth Circuit found that a putative class of legal hourly workers had standing to bring a RICO action against two agricultural companies that had

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Pelletier, 921 F.2d at 1497-98 (finding no standing as to predicate act of bankruptcy fraud where predicate act actually benefitted plaintiff). However, "a wrongful act 'is a proximate cause if it is a substantial factor in the sequence of reasonable causation.'" *Maiz v. Virani*, 253 F.3d 641, 675 (11th Cir.2001) (quoting *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.1994)) (internal quotation marks omitted). Thus, while a predicate act may not be a "but for" cause of a plaintiff's injuries, the plaintiff may nevertheless have standing to pursue a RICO claim where that predicate act was a substantial factor "in perpetuating [the racketeer's] scheme and in causing significant injury to [the plaintiff]." *Id.*

With respect to the predicate acts of harboring and inducing illegal aliens and the use and acceptance of bogus identification documents, the Court cannot conclude at this point that those predicate acts do not constitute substantial factors in causing injury to Plaintiffs. Accordingly, the Court concludes that Plaintiffs do not lack standing to claim that those predicate acts proximately caused their injuries.

allegedly hired illegal workers, thereby depressing the wages paid to documented workers. 301 F.3d at 1166. Like Defendant in the instant matter, the defendants in *Mendoza* urged the court to find that the plaintiffs were not the "first victims" of the alleged illegal conduct. The court in *Mendoza* concluded that because the defendants engaged in illegal conduct to gain "disproportionate bargaining power in employment contracts" with their workers, the legal, documented employees were the direct victims of the defendants' illegal conduct. Because "the [illegal conduct] had the purpose and direct result of depressing the wages paid to [the documented employees] by the growers," the court could not "discern a more direct victim of the illegal conduct." *Id.* at 1170. The court further explained: "Neither the government nor the undocumented workers are an intervening third party in this scheme, despite the [defendants'] arguments to the contrary." *Id.*

Plaintiffs also rely on *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir.2001), in which the Second Circuit held that the plaintiffs, who were competitors of the defendant, adequately stated a direct proximate relationship between their injuries and the defendant's alleged illegal conduct. 271 F.3d at 381. In that case, a cleaning service brought a RICO class action, alleging that the defendant, also a cleaning service, hired undocumented aliens in violation of 8 U.S.C.A. § 1324, thereby driving down the defendant's cost of employment. *Id.* at 378. The plaintiff claimed that the defendant's illegal conduct allowed the defendant to charge lower prices for its services, thereby undercutting its competition. *Id.*

The *Commercial Cleaning* court applied the *Holmes* policy considerations, and found that the plaintiffs had suffered direct injury due to the defendant's alleged racketeering activity. *Commercial Cleaning*, 271 F.3d at 385. Specifically, the Second Circuit reasoned that no class of persons would

"have a greater incentive to ensure that a RICO violation does not go undetected or unremedied, and whose recovery would cure the loss suffered by there plaintiffs." *Id.*

The Court finds *Mendoza* persuasive, and applies the *Mendoza* court's reasoning to this case. Here, Plaintiffs clearly allege that their injury is the result of Defendant's attempt to gain a commercial advantage over the employment of its workforce, which directly causes harm to Plaintiffs. Accordingly, the Court finds that the Complaint alleges a direct injury to Plaintiffs. Plaintiffs therefore do not lack standing based on the failure to allege a direct injury.

ii. Speculative Nature of Damages

The Court next considers whether the damages theory alleged in Plaintiffs' Complaint is too speculative to permit Plaintiffs to have standing to pursue their claims. Defendant sets forth a number of arguments in support of its position that the calculation of damages is exceedingly tenuous and speculative. Specifically, Defendant claims that there are numerous other factors that could affect Plaintiffs' wages, such as the demand for labor in the relevant market, the supply of qualified workers, the overall profitability of the industry, and the status of the local, state, national, and international economies.

Defendant also submits that Plaintiffs have failed to allege that Defendant employs a sufficient number of illegal workers or has such a large presence in the labor market to support a conclusion that any pay discrepancies can be attributed to Defendant's allegedly illegal conduct. In particular, Defendant contends that Plaintiffs' allegation that Defendant has assisted "hundreds" of illegal workers is insufficient as a matter of economic sense to cause depressed wages. (*See* Compl. ¶ 61.) Defendant further submits that if it were paying depressed wages to its employees, Plaintiffs could simply seek employment elsewhere.

Defendant also claims that *Mendoza* is distinguishable because the defendants in that case enjoyed market power sufficient to give them the power to "define wages in this labor market, akin to a monopsony or oligopsony." *Mendoza*, 301 F.3d at 1171. Defendant maintains that Plaintiffs have not, and cannot, allege that Defendant has such market power to dictate unilaterally the labor market. Thus, Defendant contends that it is too speculative to gauge the difference between the current level of compensation and the level of compensation that would have existed but for Defendant's alleged illegal conduct.

At this stage in the litigation, however, the Court cannot agree that the damages attributable to Plaintiffs' RICO claims are so tenuous and speculative that the Court should dismiss the Complaint for lack of standing. Simply put, at this point, the Court cannot say that as a matter of law, Plaintiffs have failed to establish that Defendant's alleged RICO violations were the proximate cause of Plaintiffs' depressed wages. Of course, after some discovery it may appear that Plaintiffs' theory is too speculative. At this early juncture, however, the Court cannot dismiss the Complaint for lack of standing on this ground.

iii. Summary

In sum, the Court denies Defendant's Motion to Dismiss on the grounds that Plaintiffs lack standing under RICO to pursue their claims. Specifically, the Court finds that Plaintiffs have sufficiently alleged an injury to their "business or property" and that such injury was proximately caused by Defendant's allegedly illegal conduct. The Court next addresses Defendant's arguments in support of dismissal of Plaintiffs' state law claims.

B. Plaintiffs' Georgia RICO Claims

Plaintiffs' Complaint also includes claims for violations of Georgia RICO, O.C.G.A. § 16-14-4(a) & (c). (Compl.¶¶ 93-105). Defendant contends that Plaintiffs' Georgia RICO claims fail as a matter of law because Defendant, as a corporation, is incapable of violating that statute.

The Eleventh Circuit has recognized that "[u]nder Georgia law, a corporation *qua* corporation, cannot be held to answer for a crime, and therefore could not violate the Georgia RICO statute." *Byrne v. Nezhat*, 261 F.3d 1075, 1105 (11th Cir.2001) (citing *Cobb County v. Jones Group*, 218 Ga.App. 149, 153, 460 S.E.2d 516, 521 (1995)). "This is not to say that a corporation may disregard the law with impunity. If a crime has been committed, the agents of the corporation who are responsible are subject to prosecution." *Id.*

Because RICO predicate acts are actually criminal offenses, O.C.G.A. § 16-2-22, entitled "Criminal responsibility of corporations," applies when determining whether a corporation is vicariously liable for the actions of its employees. O.C.G.A. § 16-2-22; *Cobb County*, 218 Ga.App. at 153, 460 S.E.2d at 521. Section 16-2-22 provides that a corporation may be prosecuted for a criminal act or omission only if:

> (1) The crime is defined by a statute which clearly indicates a legislative purpose to impose liability on a corporation, and an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his office or employment and in behalf of the corporation; or
>
> (2) The commission of the crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation.

O.C.G.A. § 16-2-22(a)(1) & (2).

Defendant first contends that Plaintiffs cannot pursue a Georgia RICO action under § 16-2-22(a)(1) because nowhere in the Georgia RICO statute does any indication of legislative purpose to impose liability on a corporation exist.

The weight of authority supports Defendant's argument. *See Clark v. Sec. Life Ins. Co. of Am.*, 270 Ga. 165, 167 n. 11, 509 S.E.2d 602, 604 n. 11 (1998) ("A corporation may also face prosecution under O.C.G.A. § 16-2- 22(a)(1) for a crime if the statute defining the crime clearly indicates a legislative purpose to impose liability on a corporation. RICO, however, in not such a statute because O.C.G.A. § 16-4-4 prohibits only 'persons' from engaging in racketeering activity."); *Cobb County,* 218 Ga.App. at 153, 460 S.E.2d at 521 ("'RICO does not contain in its definition any indication of a legislative purpose to impose criminal liability on a corporation.'") (quoting incorporated language of trial court's order). Accordingly, the Court concludes that because the Georgia RICO statute does not expressly and clearly indicate a legislative purpose to impose liability on a corporation for violations of the statute, Plaintiffs cannot avail themselves of § 16-2-22(a)(1) to impose liability for Georgia RICO violations on Defendant.

Notwithstanding the inapplicability of § 16-2-22(a)(1), the Court finds that Plaintiffs may pursue their Georgia RICO claims against Defendant under § 16-2-22(a)(2). As the Georgia Supreme Court held: "criminal liability will attach to the employer for the acts of the employee only if the 'crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation.'" *Clark*, 270 Ga. at 167, 509 S.E.2d at 604 (quoting O.C.G.A. § 16-2-22(a)(2).) It is not fatal to Plaintiffs' Complaint that they have not alleged that Defendant's board of directors or any corporate officers acting within the scope of employment authorized, requested, commanded,

performed, or recklessly tolerated violations of Georgia RICO. On the contrary, such facts are a matter of proof; thus, Plaintiffs simply must set forth the necessary proof at trial. *State v. Military Circle Pet Ctr., No. 94, Inc.*, 257 Ga. 388, 389-90, 360 S.E.2d 248, 249 (1987) ("Although the state must prove the applicable provisions of [§ 16-2-22(a)(2)] at trial against a criminal defendant, it is not necessary that the state allege these provisions in the accusation."). At this point, therefore, the Court cannot hold that Plaintiffs' Georgia RICO claims fail as a matter of law for failure to name any managerial official, officer, or similar person of Defendant who would satisfy the requirements of § 16-2-22. Accordingly, the Court denies Defendant's Motion to Dismiss with respect to Plaintiffs' Georgia RICO claims.[8]

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[8] Defendant also contends that Plaintiffs' Georgia RICO claims fail because Plaintiffs' Complaint fails to allege that violations of 8 U.S.C.A. § 1324 constituted "racketeering activity" for purposes of Georgia RICO. (*See* Compl. ¶ 62 ("Each violation of 8 U.S.C. § 1324 constitutes an act of 'racketeering activity' under [federal RICO], 18 U.S.C. § 1961(F) [sic].").) Plaintiffs respond that Defendant has misread the Complaint, but nonetheless request leave to amend their Complaint to clarify that their Georgia RICO claims are indeed predicated on violations of § 1324.

The Court agrees with Defendant that Plaintiffs' Complaint does not state a cause of action under Georgia RICO with respect to violations of § 1324, but for a different reason than that advanced by Defendant. O.C.G.A. § 16-14-3(9)(A)(xxix) defines "racketeering activity" as including "[a]ny conduct defined as 'racketeering activity' under 18 U.S.C. Section 1961(1)(A), (B), (C), and (D)." O.C.G.A. § 16-14-3(9)(A)(xxix). That definition of racketeering activity, however, does not include those acts falling under § 1961(1)(F). Violations of § 1324 appear in subsection (F), thus acts violating § 1324 cannot qualify as predicate acts for purposes of Georgia RICO. Accordingly, the Court finds that Plaintiffs' Complaint can only allege a claim based on Georgia RICO as to 18 U.S.C.A. § 1546. The Court denies Plaintiffs' request to amend their Complaint to clarify that Plaintiffs' Georgia RICO claims are predicated on violations of § 1324 as futile.

C. Plaintiffs' Unjust Enrichment Claim

Finally, the Court addresses whether Plaintiffs have stated a claim for unjust enrichment arising under Georgia law (Compl.¶¶ 106-110). Specifically, Plaintiffs claim that Defendant's illegal conduct permits Defendant "to reap substantial wage savings" because Defendant pays Plaintiffs lower wages than what Defendant would otherwise be forced to pay. (*Id.* ¶ 107). Plaintiffs also claim that Defendant has been unjustly enriched because the hiring of illegal workers has led to a reduced number of worker's compensation claims; therefore, Defendant retains money it otherwise would have to spend on responding to worker's compensation claims. Plaintiffs further allege that Defendant, through the employment of illegal workers and at the expense of Plaintiffs, enjoys larger profits than Defendant would earn if it used legal, authorized workers. (*Id.* ¶ 109.) Consequently, Plaintiffs claim that Defendant has been unjustly enriched, and that the Court should order Defendant "to disgorge its unlawful profits or otherwise return the full amount of any wage savings and worker's compensation savings that are the direct and proximate result of [Defendant's] unlawful conduct." (*Id.* ¶ 110.)

Unjust enrichment has been defined in the following manner:

> The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received; otherwise the party has been unjustly enriched at the expense of another and, in fairness and good conscience, must reimburse the other to the extent of the value conferred. Inherent in unjust enrichment is the requirement that the receiving party knew of the value

> being bestowed upon them by another and failed to stop the act or to reject the benefit.

Reidling v. Holcomb, 225 Ga.App. 229, 232, 483 S.E.2d 624, 626 (1997); *see also* Larkins, Ga. Contracts, § 12-3 (discussing generally unjust enrichment remedy). Recovery under a theory of unjust enrichment "presupposes the absence of a contractual agreement." *Fed. Ins. Co. v. Westside Supply Co.*, 264 Ga.App. 240, 248, 590 S.E.2d 224, 232 (2003) (citing *Ga. Tile Distribs., Inc. v. Zumpano Enters., Inc.*, 205 Ga.App. 487, 488, 422 S.E.2d 906 (1998)). "'The measure of damages under . . . unjust enrichment is based upon the benefit conferred upon the [recipient] and not the cost to render the service or cost of the goods.'" *Hollifield v. Monte Vista Biblical Gardens, Inc.*, 251 Ga.App. 124, 130-31, 553 S.E.2d 662, 669 (2001) (addition supplied) (quoting *Zampatti v. Tradebank Int'l Franchising Corp.*, 235 Ga.App. 333, 340, 508 S.E.2d 750 (1998)).

Defendant contends that Plaintiffs' unjust enrichment claim fails because Plaintiffs accepted employment at an agreed-upon rate. Plaintiffs have not alleged that Defendant failed to compensate Plaintiffs in accordance with that rate.[9] In other words, Defendant submits that unjust enrichment is inapplicable where an express contract exists for payment of an item or service, and the defendant avoids payment for that item or service. Defendant notes that in this case, the parties entered into a contract for a certain wage rate and Defendant paid wages in accordance with that contract. At this point in the litigation, however, the Court cannot agree that as a matter of law Defendant has been unjustly enriched by suppressing Plaintiffs' wages. Accordingly, the Court denies Defendant's Motion to Dismiss as to Plaintiffs' unjust en-

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[9] This argument is similar to Defendant's argument with respect to whether Plaintiffs alleged an injury to their business or property. *See supra* Part III.A.3.a.

richment claim as it relates to Defendant's savings in employing Plaintiffs at a diminished wage rate.

The Court notes, however, that Plaintiffs cannot base their claim of unjust enrichment on Defendant's alleged savings with respect to worker's compensation claims. Defendant argues, and the Court agrees, that Plaintiffs lack standing to assert a claim of unjust enrichment as to the amount of money Defendant did not have to spend in dealing with worker's compensation claims. Essentially, the Complaint alleges that because illegal workers tend to refrain from filing worker's compensation claims, and because Defendant consequently spent less money dealing with worker's compensation claims, Defendant enjoyed higher profitability. The Court cannot fathom how higher profit margins due to lower worker's compensation costs are connected in any way to Plaintiffs' receiving lower wages. That is to say, Plaintiffs' labor in no way caused lower worker's compensation costs. Consequently, the Court finds that Plaintiffs cannot claim unjust enrichment as to worker's compensation claims.

IV. Conclusion

ACCORDINGLY, the Court *DENIES IN PART* and *GRANTS IN PART* Defendant's Motion to Dismiss [25]. Specifically, the Court *DENIES* Defendant's Motion to Dismiss as to all Federal and Georgia RICO allegations in Plaintiff's Complaint, *DENIES* Defendant's Motion to Dismiss as to Plaintiffs' unjust enrichment claim as it relates to Defendant's wage savings in employing Plaintiffs at a diminished wage rate, and *GRANTS* Defendant's Motion to Dismiss as to Plaintiff's unjust enrichment claim as it relates to Defendant's savings with respect to worker's compensation claims.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[Filed Aug. 18, 2005]

CIVIL ACTION FILE
NO. 4:04-CV-0003-HLM

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,
Plaintiffs,

v.

MOHAWK INDUSTRIES, INC.,
Defendant.

ORDER

This is a class action alleging violations of the federal and Georgia Racketeer Influenced Corrupt Organizations Acts ("RICO"). The case is before the Court on Plaintiffs' Motion to Lift the Stay of Discovery [61] and Defendant Mohawk Industries, Inc.'s Motion to Continue the Stay of Discovery Pending its Petition for Certiorari [62].

I. Background

On January 6, 2004, Plaintiffs filed this lawsuit. Plaintiffs are current and former hourly employees of Defendant who claim that Defendant's alleged employment and harboring of illegal aliens has depressed their wages. Plaintiffs assert the following claims: (1) a claim that Defendant's conduct violates 18 U.S.C.A. § 1962(c) (Compl. ¶¶ 88-92); (2) a claim that Defendant's conduct violates O.C.G.A. § 16-14-4(a) (*id.* ¶¶ 93-98); (3) a claim that Defendant's conduct violates

O.C.G.A. § 16-14-4(c) (*id.* ¶¶ 99-105); and a claim for unjust enrichment arising under Georgia law (*id.* ¶¶ 106-110). Plaintiffs also seek certification of a class pursuant to Federal Rule of Civil Procedure 23. (*Id.* ¶ 46.)

On February 9, 2004, Defendant filed a Motion to Dismiss. Defendant requested that the Court dismiss Plaintiffs' federal and state RICO claims. Defendant also requested that the Court decline to exercise its pendent jurisdiction over Plaintiffs' state law claims.

On April 12, 2004, the Court granted in part and denied in part Defendant's Motion to Dismiss. (Order of Apr. 12, 2004.) The Court denied the Motion to Dismiss with respect to Plaintiffs' federal and Georgia RICO claims and with respect to Plaintiff's unjust enrichment claim relating to Defendant's wage savings in employing Plaintiffs at a reduced rate, but granted the Motion to Dismiss with respect to Plaintiffs' unjust enrichment claim relating to Defendant's savings with respect to workers' compensation claims. (*Id.*)

On May 27, 2004, the Court granted Defendant's request to certify its April 12, 2004, Order for an interlocutory appeal. (Order of May 27, 2004.) The Court also stayed discovery pending resolution of the interlocutory appeal. (*Id.*)

On June 9, 2005, the United States Court of Appeals for the Eleventh Circuit entered an Order affirming in part and reversing in part the Court's ruling on the Motion to Dismiss. The Eleventh Circuit affirmed the Court's decision with respect to Plaintiffs' RICO claims, but reversed the Court's denial of the Motion to Dismiss with respect to Plaintiffs' unjust enrichment claims based on Defendant's wage savings in employing Plaintiffs at a reduced rate.

Defendant filed a petition for rehearing en banc with the Eleventh Circuit. On July 29, 2005, while that petition remained pending before the Eleventh Circuit, Plaintiffs filed a Motion to Lift the Stay of Discovery in this Court.

On August 8, 2005, the Eleventh Circuit denied Defendant's petition for rehearing en banc. On August 11, 2005, Defendant filed a Motion to Continue the Stay of Discovery Pending its Petition for Certiorari.

On August 16, 2005, the Eleventh Circuit issued its mandate in the case. On August 18, 2005, the Eleventh Circuit returned the record on appeal to the Court. The case now has returned to the Court, and the interlocutory appeal proceedings have concluded. Because the interlocutory appeal proceedings have concluded, Plaintiffs' Motion to Lift the Stay of Discovery is moot. The Court, however, still must decide whether to issue a second stay of discovery pending the resolution of Defendant's petition for a writ of certiorari to the United States Supreme Court.

II. Discussion

Defendant has requested that the Court stay discovery in this case pending the resolution of Defendant's forthcoming petition for a writ of certiorari to the Supreme Court. Defendant states that if the Court grants the requested stay of discovery, Defendant will file its petition for a writ of certiorari on an expedited basis, and the Supreme Court will likely decide whether to grant the petition by the end of the year. Defendant argues that a further, modest delay of discovery would not prejudice Plaintiffs in the event that the Supreme Court denies the petition. Alternatively, Defendant notes a stay of discovery will conserve the resources of the parties and the Court in the event that the Supreme Court grants certiorari and ultimately dismisses Plaintiffs' federal RICO claim.

Not surprisingly, Plaintiffs oppose Defendant's Motion. Plaintiffs observe that Defendant "has failed three times in its bid to dismiss plaintiffs' RICO claims." (Pls.' Opp'n Def.'s Mot. Stay Discovery at 1.) Plaintiffs contend that Defendant is moving for the entry of a new stay, and that Defendant is

not entitled to such extraordinary relief. Plaintiffs assert that Supreme Court review is highly improbable in this case, and that Defendant therefore has no realistic chance of avoiding discovery altogether in this case. In particular, Plaintiffs argue that the Supreme Court almost certainly will not review the proximate cause issue asserted by Defendant, and that review of Plaintiffs' Georgia RICO claim consequently is improbable. Plaintiffs therefore contend that Defendant "has no realistic chance of avoiding plaintiffs' Georgia RICO claim," and that "there is virtually no chance that class discovery conducted while [Defendant] is petitioning for certiorari will be in vain." (*Id.* at 5.)

While the Court understands and appreciates Plaintiffs' arguments and Plaintiffs' confidence in their legal positions and the rulings of the Eleventh Circuit and this Court, the Court cannot agree that Supreme Court review of this case is "highly improbable." As the Court noted in its May 27, 2004, Order, a substantial ground for difference of opinion exists as to the federal RICO enterprise issue, and a substantial ground for difference of opinion exists as to the RICO proximate cause issue. (Order of May 27, 2004, at 3-5.) The Supreme Court very well may choose to grant certiorari—particularly with respect to the federal RICO enterprise issue. If the Supreme Court ultimately issues a ruling that would result in the dismissal of Plaintiff's federal RICO claim, this Court likely would choose to decline supplemental jurisdiction over Plaintiffs' Georgia RICO claim, thus making discovery in this Court concerning Plaintiffs' claims unnecessary.[1]

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[1] The Court's general practice is to decline to exercise supplemental jurisdiction in a federal question case after the resolution of the federal claims unless circumstances exist that make exercising supplemental jurisdiction appropriate. The Court, however, does not determine at this point whether it ultimately would decline to exercise supplemental jurisdiction in this case if the Supreme Court dismisses Plaintiffs' federal RICO claim.

Given the above circumstances, the Court finds that staying discovery pending Defendant's petition for a writ of certiorari will conserve the parties' resources and the resources of the Court. The Court further concludes that even if the Supreme Court ultimately denies Defendant's petition, staying discovery for the brief period of time associated with the certiorari process will not prejudice Plaintiffs. The Court therefore grants Defendant's Motion to Stay Discovery Pending its Petition for Certiorari, and stays discovery in this case until the Supreme Court either (a) denies Defendant's petition for a writ of certiorari or (b) decides the case on the merits after granting Defendant's petition.

III. Conclusion

ACCORDINGLY, the Court *DENIES AS MOOT* Plaintiffs' Motion to Lift the Stay of Discovery [61]. The Court *GRANTS* Defendant Mohawk Industries, Inc.'s Motion to Continue the Stay of Discovery Pending its Petition for Certiorari [62]. The Court *STAYS* discovery in this case until the Supreme Court either (a) denies Defendant's petition for a writ of certiorari or (b) decides the case on the merits after granting Defendant's petition. The Court observes that Plaintiffs apparently already have served written discovery requests on Defendant, and stays the response time for those discovery requests in accordance with this Order.

IT IS SO ORDERED, this the 18th day of August, 2005.

/s/ Harold Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jul. 28, 2004]

No. 04–90017-B

MOHAWK INDUSTRIES, INC.,
Petitioner,

versus

SHIRLEY WILLIAMS, GAIL PELREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,
Respondents.

Petition for Permission to Appeal an Order from the United States District Court for the Northern District of Georgia

---

Before TJOFLAT, HULL and MARCUS, *Circuit Judges*.

BY THE COURT:

The Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b) is *GRANTED*.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[Filed May 27, 2004]

CIVIL ACTION FILE
NO. 4:04-CV-0003-HLM

SHIRLEY WILLIAMS, BONNIE JONES, AND LORA SISSON,
individually and on behalf of a class,
Plaintiffs,

v.

MOHAWK INDUSTRIES, INC.,
Defendant.

ORDER

This is a class action alleging violations of the federal and Georgia Racketeer Influenced and Corrupt Organizations Acts ("RICO"). The case is before the Court on Defendant's Motion for Amendment of the Court's Order on Defendant's Motion to Dismiss to Permit Interlocutory Appeal [46-1] and for Stay of Discovery [46-2].

On April 12, 2004, the Court denied in part and granted in part Defendant's Motion to Dismiss. (Order of Apr. 12, 2004.) The Court found *inter alia* that Plaintiffs had adequately alleged the existence of a RICO enterprise and proximate causation to survive Defendant's Motion to Dismiss. Defendant requests this Court's permission to file an interlocutory appeal as to those two conclusions and requests a stay of discovery pending the appeal. For the reasons set forth below, the Court grants Defendant's Motion.

Pursuant to 28 U.S.C.A. § 1292(b), a district court may permit an interlocutory appeal of an order. 28 U.S.C.A. § 1292(b) provides, in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C.A. § 1292(b). Thus, to certify an order for interlocutory review under § 1292, a district judge must find that: (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists with respect to the question of law; and (3) an immediate appeal from the order will materially advance the ultimate termination of the litigation. *Id.* Once the Court certifies an order for appeal under § 1292(b), and the United States Court of Appeals for the Eleventh Circuit grants leave to appeal, the entire order becomes subject to interlocutory appellate review. *City of Jacksonville v. Dept. of Navy*, 348 F.3d 1307, 1310 (11th Cir. 2003).

The Court first examines whether the April 12, 2004, Order involves controlling questions of law. § 1292(b). "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if it is not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 565, 659 (7th Cir. 1996). Defendant contends that two "controlling" issues of law exist: (1) whether Plaintiffs have adequately pleaded the

existence of a RICO enterprise; and (2) whether Plaintiffs have adequately pleaded proximate causation with respect to injury to Plaintiffs' business or property. Those issues are "controlling," according to Defendant, because if Plaintiffs have not adequately pleaded the existence of a RICO enterprise or proximate causation, Plaintiffs' RICO claims necessarily fail.

The Court finds Defendant's argument persuasive, and agrees that those questions of law constitute "controlling questions" under § 1292(b) because the resolution of the question "is quite likely to affect the further course of the litigation." Consequently, the Court finds that the first of the § 1292(b) factors counsels in favor of permitting an interlocutory appeal.

The Court next addresses whether substantial ground for difference of opinion exist as to the Court's conclusions in its Order of April 12, 2004. Defendants rely heavily on the Seventh Circuit's opinion in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), in support of its argument.

As the Court explained in its April 12, 2004, Order, relatively few reported cases exist dealing with RICO claims on behalf of employees against employers for purposed hiring of illegal workers, and only one case, *Baker*, addresses the issue of pleading the existence of a RICO enterprise in such cases. *Baker*, 357 F.3d at 691. Although the Court distinguished *Baker*, the Court nevertheless recognizes that a difference of opinion exists as to what constitutes sufficient pleading of a RICO enterprise where a plaintiff asserts a RICO claim relating to hiring of illegal aliens. Moreover, the Eleventh Circuit has not spoken directly as to whether an association of recruiters and an employer is sufficient as a matter of law to constitute a RICO enterprise. The Court therefore believes that a substantial ground for difference of opinion exists as to this issue.

Similarly, the Court believes that a substantial ground for difference of opinion exists as to the issue of proximate causation. As with pleading the existence of a RICO enterprise, few courts have addressed proximate causation in a case such as the instant action. While Plaintiffs correctly note that *Baker* "bypass[ed]" the issue of causation, that it is clear from that opinion that the Seventh Circuit is skeptical that under the facts of that case, which are similar to the facts of the instant action, it is possible to allege proximate causation. *Baker*, 357 F.3d at 692.[1] The Court thus believes that a substantial difference of opinion exists as to whether Plaintiffs have adequately alleged that their injuries were the proximate cause of Defendant's alleged racketeering activity. Consequently, the Court finds that the second § 1292(b) factor counsels in favor of permitting an interlocutory appeal of the Court's April 12, 2004, Order.

Finally, the Court examines the third prong of the § 1292(b) factors—*i.e.* whether an interlocutory appeal of the Court's April 12, 2004, Order will materially advance the ultimate termination of this litigation. Clearly, if on appeal the Eleventh Circuit determines that Plaintiffs have not adequately pleaded the existence of a RICO enterprise or proximate causation, then Plaintiffs' RICO claims necessarily fail. Furthermore, such a determination would possibly abrogate the need for substantial expenditure of resources by the Court and the parties. The Court thus believes that this third prong counsels in favor of permitting an interlocutory appeal.

In sum, the Court concludes that an interlocutory appeal of the Court's April 12, 2004, Order is appropriate. The Court will stay discovery in the case pending a ruling from the Eleventh Circuit concerning the interlocutory appeal proceedings.

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[1] Indeed, the Seventh Circuit explicitly left open the question as to whether it would follow *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002).

ACCORDINGLY, the Court *GRANTS* Defendant's Motion for Amendment of the Court's Order on Defendant's Motion to Dismiss to Permit Interlocutory Appeal [46-1] and for Stay of Discovery [46-2]. The Court *AMENDS* the April 12, 2004, Order to provide that Defendant may seek interlocutory review of the April 12, 2004, Order pursuant to 28 U.S.C.A. § 1292(b). The Court *STAYS* discovery in this case until the Eleventh Circuit disposes of the interlocutory appeal. The Court notes that this stay is without prejudice as to issues regarding class certification.

IT IS SO ORDERED, this the 27th day of May, 2004.

/s/ Harold Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 8, 2005]

No. 04-13740-AA

SHIRLEY WILIAMS, GALE PELFREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,
Plaintiffs-Appellees,

versus

MOHAWK INDUSTRIES, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: ANDERSON, HULL and GIBSON*, *Circuit Judges*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

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No. 05-465

NOV 9 - 2005

In The

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTRODUCTION

Petitioner Mohawk Industries, Inc. ("Mohawk") asks this Court to grant *certiorari* to review two questions. The first question concerns an alleged circuit split over whether a corporation and its agents can constitute an "association-in-fact" enterprise under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). But that question was neither discussed nor decided in the Court of Appeals decision of which Mohawk seeks review. The Eleventh Circuit, like the district court, merely concluded that Respondents' allegation of an association-in-fact enterprise consisting of a corporation and distinct third-parties comes within the statutory definition of an enterprise. 18 U.S.C. § 1961(4) ("enterprise includes . . . any union or group of individuals associated in fact though not a legal entity"). The Complaint did not allege an agency relationship among the members of the enterprise, and the Eleventh Circuit made no ruling regarding whether a corporation and its agents can constitute an enterprise. Accordingly, this case does not even present the first question Mohawk seeks to raise.

Mohawk's second question is whether Respondents' complaint adequately alleges a proximately caused injury to business or property. Every circuit court to address this question (the Sixth, Ninth and now Eleventh) has held allegations that an employer depresses wages by hiring illegal workers adequately states a proximately caused injury to business or property under the RICO statute. There is no split of authority as to whether an injury to wages is an injury to business or property and no reason for the Petition to be granted.

REASONS FOR DENYING THE PETITION

The Eleventh Circuit's interlocutory, *per curiam* decision to affirm the denial of a motion to dismiss in this case does not merit review by this Court. The Court of Appeals decision is compelled by the plain language of the federal RICO statute and this Court's decisions. Because neither of the questions that Mohawk presents satisfies

this Court's standards for review, the petition should be denied.

I. The Eleventh Circuit Did Not Address Mohawk's First Question Presented.

Mohawk's Petition argues that this Court should grant *certiorari* to resolve an alleged circuit split over whether a "defendant corporation and its agents can constitute an 'enterprise' under [RICO]."[1] Mohawk claims that the Court of Appeals for the Eleventh Circuit answered this question in the affirmative,[2] but that is not correct. Respondents' Complaint does not allege an agency relationship between Mohawk and the third parties with whom Mohawk associates to obtain and harbor illegal workers. And the Eleventh Circuit did not construe the Complaint as alleging an agency relationship. Instead, the Court simply held that Respondents had alleged an association-in-fact enterprise that satisfies RICO's enterprise requirement. *Williams v. Mohawk, Industries, Inc.*, 411 F.3d 1252, 1258 (11th Cir. 2005) (allegations "that Mohawk and third-party temp agencies/recruiters have conspired to violate federal immigration laws, destroy documentation and harbor illegal workers" satisfy enterprise requirement); *see also*, 18 U.S.C. § 1961(4) of RICO (an enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"). Because the opinion below does not address the first question Mohawk presents, this Court should decline to grant *certiorari* on that question.

The Eleventh Circuit's holding that entities that associate with third parties to engage in a pattern of racketeering activity are subject to RICO liability is in

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[1] *See* Petition for a Writ of Certiorari at i & 10-18 (hereafter "Petition").

[2] *Id.* at 3 ("The Eleventh Circuit's affirmative answer to this question exacerbated a sharp split in the court of appeals (now two to three)").

accord with settled law and the plain language of the RICO statute. This holding breaks no new ground and does not criminalize routine corporate conduct. Nor does it present any basis for *certiorari* review.

II. Respondents' Complaint Properly Alleges a Proximately Caused Injury to Business or Property.

The second question that Mohawk presents for review is whether Respondents' claim that Mohawk depresses wage rates through the illegal hiring and harboring of unauthorized workers adequately alleges a proximately caused injury to business or property. In concluding that the Complaint states a RICO claim, the Eleventh Circuit engaged in a thorough analysis of the relevant standards and authorities. *Williams*, 411 F.3d at 1260-1263. The Eleventh Circuit's conclusion that the Complaint adequately pleads an injury to business or property under RICO's statutory damages provision, 18 U.S.C. § 1964(c), is in complete accord with decisions of the Sixth and Ninth Circuits, which came to the very same conclusions in RICO cases alleging the same violations and injuries. *Trollinger v. Tyson Foods*, 370 F.3d 602, 612-619 (6th Cir. 2004); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168-1172 (9th Cir. 2002). The Second Circuit engaged in the same analysis and reached the same conclusion in a RICO case alleging competitive injury caused by the same predicate offenses, an illegal immigrant hiring scheme. *Commercial Cleaning Servs., L.L.C. v. Colin Service Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001).

All four of these circuit court decisions are consistent with this Court's holding, in the civil RICO context, that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *N.O.W. v. Scheidler*, 510 U.S. 249, 256 (1994) (reversing dismissal of RICO complaint); *see also Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) (rejecting the use of a

heightened pleading standard as inconsistent with Rule 8). Thus, there is no split of authority on the adequacy of the Respondents' allegations to state a RICO claim and no reason to grant *certiorari*.

Mohawk asserts that the Eleventh Circuit's routine decision, merely holding that the allegations of a RICO complaint state a cause of action, is somehow made more complex because it concerns wage rates. But the Eleventh Circuit's decision follows and is entirely consistent with prior authorities. Hence, the decision neither expands nor departs from existing law. As set forth above, every court in the nation to consider the question has held that a claim of wage depression caused by an illegal immigrant hiring scheme states an injury to "business or property" under 18 U.S.C. § 1964(c). *See Trollinger, supra*; *Mendoza, supra.* Every other decision interpreting this section has also held that wages are "business or property." *See, e.g., Rice v. Janovich*, 109 Wash. 2d 48, 60-61, 742 P.2d 1230, 1237 (Wash. 1987) ("federal cases since *Sedima* have specifically held that lost wages may be recovered in civil RICO actions, and we follow that conclusion") (collecting authorities); *accord,* David B. Smith and Terrance G. Reed, CIVIL RICO, § 10.04 at 20.2 (Matthew Bender 2005) ("Nonetheless, it is generally accepted that lost wages are a form of property damage that is recoverable under RICO") (citing *Mendoza*).

Indeed, the Ninth Circuit recently confirmed that an injury to wages is an injury to business or property in a *per curiam* decision. *Diaz v. Gates*, 420 F.3d 897, 898 (9th Cir. 2005) (holding that "lost employment, employment opportunities, and the wages and other compensation associated with said business . . . " were compensable injuries under RICO). Even the *Diaz* dissent agreed that *Mendoza* was properly decided on this question. It stated: "*Mendoza's* determination of standing [under RICO] was understandable on its facts, where the conspiracy challenged under RICO was aimed directly at suppressing the wages of farm workers." *Id.* at 907 (Gould, dissenting). Thus, the Eleventh Circuit's straightforward holding that "[g]iven that a relationship clearly exists between plaintiff workers and their employer, Mohawk, we conclude that a

similar business interest exists in this case, and that the employees' alleged injury to their business interests satisfies the business-interest requirement" is plainly correct and plainly not worthy of review. *Williams,* 411 F.3d at 1260.

Moreover, Mohawk's contention that the "acceptance" of illegally depressed wages results in a waiver of the right to sue under RICO, Petition at 21, is completely erroneous. None of the courts to address claims of wage depression in illegal hiring cases have accepted such an argument. The argument is inconsistent with jurisprudence under the antitrust statutes on which RICO is modeled. If Mohawk were correct, then a buyer who "voluntarily" paid a supra-competitive fixed price could not thereafter raise an anti-trust challenge. Needless to say, this Court and every circuit permit consumers to sue sellers for charging illegally fixed prices. Any suggestion that the payment of an illegal price constitutes a waiver of the right to sue for price-fixing has long been discredited. *See, e.g., Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 489 (1968) ("We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a *prima facie* case of injury and damage within the meaning of sec. 4 [of the Clayton Act]"). There is no split of authority on the question of whether Respondents may sue for depressed wage rates under RICO and no reason to grant *certiorari* on that question.

CONCLUSION

Mohawk's Petition should be denied because the two questions it presents do not meet this Court's standards for a grant of *certiorari*. *See* Supreme Court Rule 10. Mohawk's first question presented was neither discussed nor decided in this case. Mohawk's second question asks this Court to review the application of well-settled law since the question has been uniformly decided by every circuit to consider it. As a result, the Petition does not present a question that merits review.

Respectfully submitted,

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No. 05-465

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

As Petitioner has demonstrated, this case presents two significant questions concerning the interpretation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), each of which merits this Court's review: whether a defendant corporation can conduct or participate in the affairs of a distinct RICO enterprise whose only members are the corporation and its agents; and whether plaintiffs who have voluntarily accepted allegedly depressed wages can allege proximately caused harm to their "business or property." As to the first question, Respondents' only answer is to mischaracterize the circuit split and the Eleventh Circuit's holding in this case. As to the second, Respondents' Opposition only underscores the need for this Court to address the limitations on standing in a civil RICO suit. Respondents' arguments are meritless, and this Court should grant certiorari.

1. The Eleventh Circuit's decision in this case exacerbated a three-to-two split in the circuits over whether a corporation can be subject to RICO liability for operating and managing an "enterprise" consisting of the corporation and third party agents acting on the corporation's behalf. The Second, Third, and Seventh Circuits have held that such "enterprise" allegations are insufficient; the Sixth Circuit (and now the Eleventh Circuit) have held that they are sufficient. Respondents do not deny that this split exists, nor do they contest that this issue merits this Court's attention. Instead, Respondents curiously contend that "the opinion below does not address the first question" because the Eleventh Circuit did not explicitly find that Respondents' complaint alleged an agency relationship. Opp. 2.

Respondents are flatly wrong. None of the Circuits on either side of the split relied on the existence *vel non* of formal agency. None of these cases turned on whether a

RICO plaintiff explicitly "allege[d] an agency relationship" or whether, applying Restatement of Agency principles, the court "construe[d] the [c]omplaint as alleging an agency relationship." Opp. 2. Instead, the issue addressed in all these cases is whether a corporation can participate in a RICO enterprise consisting of itself and third parties performing business functions on its behalf.

Three Circuits—the Second, Third and Seventh—answered in the negative, without resort to formal agency principles. The plaintiffs in *Baker* v. *IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004), alleged an association-in-fact enterprise consisting of the defendant corporation, third party recruiters, and "immigrant welfare organizations"—an "enterprise" materially identical to the one alleged by Respondents here. *Id.* at 687.[1] The *Baker* court did not hold that these third parties were IBP's agents (although it noted that the plaintiffs came "perilously close" to alleging a formal agency relationship); on the contrary, it assumed that the recruiters were *not* IBP's agents. See *id.* at 691. Nonetheless, the court held that these allegations still did not support a conclusion that IBP was operating or managing a distinct enterprise (as opposed to operating or managing itself). See *id.*[2]

Nor did *Brittingham* v. *Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991), rest upon an allegation or holding that third parties

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[1] Counsel of record for Respondents in this case also represented the *Baker* plaintiffs.

[2] In *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997), the Seventh Circuit noted that the third party dealerships that were claimed to be part of an "enterprise" with Chrysler were acting as Chrysler's "agents." *Fitzgerald*'s holding, however, was not based upon the implications of a formal agency relationship. Rather, *Fitzgerald* was based on the recognition that Chrysler did not create a distinct enterprise when it dealt with its dealerships "in the ordinary way . . . differing not at all from what it would be if [the dealerships] were the employees of a totally integrated enterprise." *Id.* at 228.

were the defendant corporation's agents. In fact, *Brittingham* explicitly extended its holding beyond a corporation's formal "agents" to other "entities acting on behalf of a defendant corporation." *Id.* at 301. Indeed, the alleged enterprise in *Brittingham*—"'[t]he association in fact of Mobil and Mobil Chemical [and] the advertising agencies engaged by them'"—is factually quite similar to the association Respondents alleged among Mohawk and the recruiters it has engaged. *Id.* at 300 (first alteration in original) (quoting complaint).

Likewise, *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998), rejected both an alleged association in fact enterprise between a corporation and its unnamed "agents" and an alleged enterprise between the corporation and its "attorneys" and "accountants." *Id.* at 1064. The controlling factor in *Discon* was not whether the plaintiffs had affirmatively alleged that the third parties were the defendant corporation's "agents." Rather, it was whether the third parties were "act[ing] on behalf of the corporation" in a looser sense. *Id.*

By contrast, the Sixth and Eleventh Circuits have held—without placing any reliance upon formal agency concepts—that a corporation does create a distinct RICO "enterprise" when it uses third parties to perform normal corporate functions on the corporation's behalf. In *Davis* v. *Mutual Life Insurance Co. of New York*, 6 F.3d 367, 377 (6th Cir. 1993), the Sixth Circuit upheld the sufficiency of an enterprise consisting of a defendant insurance company and a third party insurance agency that sold policies for the defendant. Because the defendant and the insurance agency were "distinct entit[ies]," they could constitute a RICO enterprise. *Id.* The *Davis* court placed no particular significance on whether or not the insurance agency was the defendant's "agent."

Given these holdings, Respondents are simply mistaken in their efforts to distinguish the instant case. The "enterprise" that the Eleventh Circuit approved in this case is precisely the

kind of enterprise that *Baker*, *Brittingham*, and *Discon* rejected (and that *Davis* approved)—an association in fact between a corporation and third parties performing business functions on its behalf. Respondents allege that third-party recruiters supplied Mohawk with workers in exchange for a fee. Pet. App. 7a. According to the complaint, the recruiters acted "under Mohawk's direction" in order "to bring illegal workers into this country for Mohawk's benefit." *Id.* at 7a-8a, 10a. The Eleventh Circuit's holding that these allegations constitutes participation in a RICO enterprise (distinct from Mohawk itself) directly conflicts with the holdings of the Second, Third, and Seventh Circuits.[3]

In short, the Eleventh Circuit's acceptance of Respondents' enterprise allegations squarely presents the issue of whether a defendant corporation and third parties performing business functions on the corporation's behalf can together constitute participation in a RICO enterprise distinct from the corporation itself. The Eleventh Circuit's conclusion that Respondents properly alleged an enterprise both exacerbates a deep split among the courts of appeal and unwarrantedly expands RICO liability by effectively reading out of § 1962(c) the enterprise participation requirement for corporate defendants. It is time for this Court to settle this conflict by granting the petition for certiorari. The coercive force of the harsh sanctions imposed under RICO should not

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[3] Respondents' suggestion that the Eleventh Circuit's decision somehow did not implicate this split is plainly wrong. Indeed, the Eleventh Circuit itself noted that its decision "puts our circuit in conflict with the Seventh Circuit's decision in *Baker* v. *IBP, Inc.*" Pet. App. 9a. Moreover, Respondents' focus on a formal agency relationship is especially off the mark in light of the Eleventh Circuit's (and the Sixth Circuit's) distinct entity holding—that an enterprise may consist of a corporation and third parties so long as those third parties are legally separate from the corporation. *See id.* at 7a. This test does not turn on formal agency. Thus, it is not surprising that the Eleventh Circuit did not explicitly address an agency relationship between Mohawk and its alleged recruiters.

depend on whether the litigation takes place in Chicago or Atlanta.

2. In addition, Respondents' Opposition underscores the importance of this case by illustrating the unduly expansive interpretations given to RICO's standing requirement. By permitting plaintiffs to use RICO to seek a retroactive wage increase, the Eleventh Circuit—following the Ninth Circuit's lead—has ignored the limitations upon civil RICO standing.

In creating a private right of action under RICO, Congress deliberately limited the class of plaintiffs who could recover for damages. Only plaintiffs injured in their "business or property" have standing to seek treble damages for that narrow class of injuries. 18 U.S.C. § 1964(c). Thus, courts have held that non-economic injuries are not injuries to business or property. See, *e.g.*, *Doe* v. *Roe*, 958 F.2d 763 (7th Cir. 1992) (rejecting RICO claims for personal injury based on coercive sexual relationship between attorney and client). Likewise, not all economic injuries are injuries to business or property. Yet both the Ninth and Eleventh Circuits have treated the narrow "business or property" language as being synonymous with a generalized "economic injury." Congress, however, did not confer RICO standing so broadly.

Respondents assert that the Ninth and Eleventh Circuits "came to the very same conclusions" in permitting RICO plaintiffs to sue for retroactive wage increases. Opp. 3.[4] Those courts reached the same result, but the profound differences in their reasoning show the violence to the plain-language limitations on RICO standing embodied in those holdings. The Ninth Circuit's opinion in *Mendoza* v. *Zirkle* summarily reasoned that the plaintiffs could recover increased wages because the plaintiffs had a property right in the form

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[4] Respondents assert that the Sixth Circuit's opinion in *Trollinger* v. *Tyson Foods, Inc.* is also in accord. *See* Opp. 3. It is not, because it did not address the question of whether lost wages are properly considered injury to "business or property." 370 F.3d 602, 612-19 (6th Cir. 2003).

of a "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." 301 F.3d 1163, 1168 n.4 (9th Cir. 2002). The Ninth Circuit cited no state or federal law establishing this new property right and none exists. The Eleventh Circuit endorsed the Ninth Circuit's decision and reached the same result—permitting plaintiffs to recover a wage raise—but based its decision on the "business" prong. Pet. App. 12a.

Together, the Ninth and Eleventh Circuits have treated the "business or property" interest as not placing any restrictions upon the type of economic injuries recoverable under RICO. Indeed, the case cited by Respondents, *Rice* v. *Janovich*, 742 P.2d 1230 (Wash. 1987) (en banc), says just that. According to *Rice*, RICO's "business or property" language allows recovery for all "[i]njuries resulting from the predicate offenses." *Id.* at 1237. Congress, however, did not use the words "economic injury," but instead the narrower words "business or property," which require injury to a business or property right. The Eleventh Circuit's broad application of RICO extends far beyond the plain language and effectively "read[s] Congress's words of limitation as mere sham." *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co*, 514 U.S. 645, 655 (1995). The court below—by ignoring Congress's limitation of RICO to injuries to "business or property"—has dramatically expanded the class of plaintiffs and wrongly exposed numerous defendants to the draconian sanctions embodied in RICO and the hydraulic pressure to settle that those sanctions create.

Respondents' theory of liability—that a company can be liable under RICO by using its own employees and a hiring agency to employ illegal aliens and thereby reduce all other employees' wages—is a square peg that does not fit the round hole Congress enacted in RICO. The Court should grant both questions to provide needed guidance on a statute that continues to be abused and needs to be limited in accordance with its plain terms and Congress's evident intent.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a defendant corporation and its agents engaged in ordinary, arms-length dealings can constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some distinct enterprise and not just its own affairs.

STATEMENT REQUIRED BY RULE 24.1(B)

Pursuant to Supreme Court Rule 24.1(b), petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption above.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioner Mohawk Industries, Inc. states that there is no parent corporation or publicly held corporation that owns 10% or more of Mohawk Industries, Inc.'s stock.

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OPINIONS BELOW

The opinion of the district court denying in part and granting in part the motion to dismiss of petitioner Mohawk Industries, Inc. ("Mohawk") was reported at 314 F. Supp. 2d 1333 (N.D. Ga. 2004) and is reproduced in the appendix to the Petition for Writ of Certiorari (Pet. App.) at 24a–61a. The order of the district court certifying the case for interlocutory appeal was unpublished and is reproduced at Pet. App. 68a–72a. The order of the Eleventh Circuit granting Mohawk's petition for interlocutory appeal was unpublished and is reproduced at Pet. App. 67a. The opinion of the court of appeals affirming in part and reversing in part the district court's order was published at 411 F.3d 1252 (11th Cir. 2005), and is reproduced at Pet. App. 1a–23a. The order of the court of appeals denying rehearing *en banc* was unpublished and is reproduced at Pet. App. 73a.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2005. An order denying petitioner's petition for rehearing *en banc* was entered on August 8, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1961(3) of Title 18 to the United States Code provides that:

> [As used in this chapter,] "person" includes any individual or entity capable of holding a legal or beneficial interest in property[.]

Section 1961(4) of Title 18 to the United States Code provides that:

> [As used in this chapter,] "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]

Section 1962(c) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1964(c) of Title 18 to the United States Code provides in relevant part that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee[.]

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") imposes liability upon a person who conducts or participates in the conduct of a separate enterprise through a pattern of racketeering activity. See *id.* § 1964(c). RICO is not a general prohibition of conspiracy or acting in concert to commit certain predicate offenses identified in the statute. To the contrary, it is a much narrower statute aimed only at those who misuse an "enterprise" as that term is defined in the statute. This Court

has ensured adherence to such limitations on RICO liability in order to avoid transforming it into a general liability statute applicable to any alleged conspiracy or business dispute. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

In this case, respondents allege that Mohawk Industries, Inc. ("Mohawk") is liable under RICO because it allegedly hired unauthorized workers and contracted with labor recruiters to assist it in hiring workers. Respondents do not allege that Mohawk is the enterprise, nor do they allege that that any recruiting company is the enterprise. Instead, respondents allege that the "association of Mohawk and the recruiters constitutes an association-in-fact enterprise." JA 24 (Compl. ¶ 79).

The Eleventh Circuit held that respondents had stated a claim under RICO because Mohawk and the recruiters were legally separate entities allegedly acting in a loose or informal association. The theory adopted by the Eleventh Circuit would vastly widen the scope of the "enterprise" element of RICO and thus expand the sweep of the statute. According to the Eleventh Circuit, the "definitive factor" in pleading, or proving, an "association-in-fact" enterprise is the "existence of an association of individual entities, *however loose or informal*, that furnishes a vehicle for the commission of two or more predicate crimes." Pet. App. 7a (emphasis added) (internal quotation marks omitted). Because all alleged corporate conspiracies involve at least a loose or informal association with another entity or individual, this definition of enterprise would allow virtually every alleged corporate conspiracy, including most fraud claims and other business torts, to be pled as civil RICO claims.

The Eleventh Circuit's enterprise theory should be rejected on two main grounds. At the outset, the statutory definition of "enterprise" limits association-in-fact enterprises to groups of individuals, not corporations. Section 1961(4) plainly states that an "association-in-fact" enterprise consists of a "group of *individuals*." 18 U.S.C. § 1961(4) (emphasis

added). Congress' choice of the word "individuals," rather than the very different terms "persons" or "entities," reflects an intent to limit the otherwise boundless scope of an "association-in-fact" enterprise. Interpreting "individuals" to mean "individuals" fully serves the aim of the "association-in-fact" enterprise—to bring the control of gangs and organized crime families within RICO's purview.

Even if, in theory, corporations could be members of association-in-fact enterprises, the alleged "enterprise" of Mohawk and its recruiters runs contrary to this Court's prior guidance on the scope of RICO. This Court has held that a RICO claim must plead an "enterprise" that is functionally distinct from the RICO defendant, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 160 (2001), *and* that the defendant must have "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs," *Reves*, 507 U.S. at 185 (1993).

In this case, the alleged enterprise is created by Mohawk's contracting for recruiting and employment services. But, a separate "enterprise" is not formed by a corporation's ordinary contractual agreement with a third party for business services. Moreover, Mohawk's alleged conduct in contracting for labor recruiting and employment services does not involve conducting or participating in the conduct of the affairs of some *separate* enterprise. To the contrary, respondents allege only that Mohawk conducted its own business unlawfully. In fact, the allegations of causation and damages make clear that the gravamen of respondents' claim is that Mohawk's operation of its own business caused respondents an injury—not the operation of some separate association-in-fact "enterprise." Specifically, respondents claim that the hiring of unauthorized workers by Mohawk injured them because Mohawk thereby "depressed" the wages Mohawk paid to them. It is clear that all of the allegations—from the alleged illegal hiring to the alleged suppression of

wages—involve the "conduct" of Mohawk's business, not that of some fictional, distinct "enterprise."

In sum, the Eleventh Circuit's decision would permit the pleading of a RICO claim anytime a corporation contracts for services or otherwise acts through an "agent" rather than through its own employees. Such a broad interpretation of the enterprise element of RICO is contrary to the plain language of the statute and would transform RICO into a general civil liability statute for virtually all alleged corporate conspiracies, in contravention of Congress' intent and this Court's longstanding interpretation of the statute.

STATEMENT OF THE CASE

1. On January 5, 2004, respondents filed a complaint in the United States District Court for the Northern District of Georgia on behalf of a putative class of hourly Mohawk employees in Georgia. JA 7 (Compl. ¶ 1). Respondents alleged that they are four current and former Mohawk employees. Mohawk is the world's leading manufacturer of carpet, rugs, tile and other floor coverings. Mohawk manufactures such well-known brands as Karastan, Lees and Bigelow. According to the complaint, Mohawk employs over 30,000 employees, most of whom work in Northwest Georgia. JA 8 (Compl. ¶ 2).

Respondents' complaint concerns Mohawk's core corporate task of hiring employees. Respondents allege that their wages were depressed by "Mohawk's employment and harboring of large numbers of ill[illegible] workers." JA 7 (Compl. ¶ 1). Respondents asserted a federal RICO claim under 18 U.S.C. § 1962(c), two claims under Georgia's RICO statute (Ga. Code Ann. § 16-14-4), and a claim for unjust enrichment under state law. JA 7, 13-14, 25-29 (Compl. ¶¶ 1, 33, 88-110).

As RICO predicate acts, respondents alleged a series of immigration violations, nearly all of which supposedly were

committed by Mohawk and its employees without the aid or involvement of any third party.[1] Respondents alleged that Mohawk "accepted for employment and continued to employ workers that it knew or had reason to know were not authorized to work in the United States" and that Mohawk "knowingly and recklessly accepted" false documents as proof of eligibility for employment.[2] JA 10 (Compl. ¶¶ 15, 16). Similarly, respondents claimed that "Mohawk employees" and "Mohawk supervisors" "assisted illegal workers in attempting to evade detection by law enforcement," "destroyed eligibility documents" to conceal their acceptance of illegal employees, and encouraged illegal aliens leaving the United States "to return to the United States and reapply for work at Mohawk in violation of United States law." JA 11, 13 (Compl. ¶¶ 18, 20, 28).

Persons other than Mohawk employees are mentioned in only two of the 26 paragraphs of factual allegations in the complaint. The complaint alleged that Mohawk employees and "other persons" transported undocumented aliens from Brownsville, Texas to Georgia; that Mohawk paid its employees and "other recruiters" incentives for locating workers; and that "[v]arious recruiters, including Mohawk employees" provided housing to illegal aliens and helped them procure jobs with Mohawk. JA 11-12 (Compl. ¶¶ 22-23).

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[1] Although the allegations in the complaint must be taken as true at this stage, Fed. R. Civ. P. 12(b)(6), Mohawk categorically denies respondents' allegations of illegal hiring practices. Indeed, as the complaint itself notes, Mohawk complies with its legal obligations and "terminates illegal workers after discovering that they are not authorized to work in the United States." JA 12 (Compl. ¶ 25).

[2] Specifically, the complaint states that "Mohawk employees and supervisors have stated that they are aware that illegal workers can easily obtain false identification." JA 11 (Compl. ¶ 21). However, the law requires employers such as Mohawk to "honor documents tendered that on their face reasonably appear to be genuine" 8 U.S.C. § 1324b(a)(6).

With respect to these allegations, respondents claim that Mohawk violated 8 U.S.C. § 1324(a)(3)(A) by knowingly hiring more than 10 illegal aliens during a 12-month period, JA 19 (Compl. ¶ 59); that Mohawk harbored illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) by "knowingly employing illegal aliens" and "taking steps to shield those illegal aliens from detection," JA 19 (Compl. ¶ 60); that Mohawk's employment of illegal aliens violated 8 U.S.C. § 1324(a)(1)(A)(iv) by encouraging illegal aliens to enter the United States, JA 20 (Compl. ¶ 61); that Mohawk accepted identification documents that it knew were false, in violation of 18 U.S.C. § 1546(a), JA 20 (Compl. ¶ 63); and that Mohawk used identification documents that it knew were false, in violation of 18 U.S.C. § 1546(b), JA 20-21 (Compl. ¶ 64). The complaint does not allege that any third parties were involved in these alleged violations of law.

Respondents' allegations relating to the alleged RICO "enterprise" are exceedingly thin. Respondents assert that Mohawk used third parties such as employment agencies to recruit workers whom Mohawk supposedly knew were illegal aliens. The complaint contains a conclusory allegation that this contractual relationship between "Mohawk and the recruiters constitutes an association-in-fact enterprise." JA 24 (Compl. ¶ 79). Mohawk allegedly "participates in the operation and management of the affairs of the enterprise, which exists for Mohawk's benefit" and has the "common purpose" of "obtaining illegal workers for employment by Mohawk." JA 23 (Compl. ¶¶ 77-78).

Respondents acknowledged that the alleged "association in fact" between Mohawk and the third parties was based upon a contract pursuant to which Mohawk paid fees to the recruiters:

> Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a

> particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like [Temporary Placement Services], have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee.

JA 23 (Compl. ¶ 76). The recruiters allegedly were "sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity." *Id.* But, there is no allegation in the complaint that any recruiting agency itself was the RICO enterprise.

2. Mohawk moved to dismiss all four counts of the complaint, arguing, *inter alia*, that respondents had failed to plead participation in the conduct of a distinct RICO enterprise. The district court denied Mohawk's motion to dismiss the RICO claim,[3] but it certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed all further proceedings pending appeal. Pet. App. 61a, 72a. The district court found, *inter alia*, that there was "substantial ground for difference of opinion" on the question whether respondents sufficiently had pled that Mohawk was conducting the affairs of a distinct RICO enterprise. *Id.* at 71a. The Eleventh Circuit granted Mohawk's petition to appeal. *Id.* at 67a.

The Eleventh Circuit affirmed the district court's denial of Mohawk's motion to dismiss the RICO claim.[4] Pet. App.

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[3] The district court partially granted Mohawk's motion to dismiss the unjust enrichment claim, dismissing respondents' claim for unjust enrichment that arose out of Mohawk's supposed benefit from workers' compensation savings. Pet. App. 61a. That issue is not before this Court.

[4] The Eleventh Circuit reversed the district court's judgment on the unjust enrichment claims in part, holding that respondents' unjust enrichment claim should have been dismissed in its entirety because

23a. According to the Eleventh Circuit, all that was required to plead a § 1962(c) enterprise was allegations of a "loose or informal association of distinct entities." *Id.* at 7a (internal quotation marks omitted). Because Mohawk and the third-party recruiters allegedly were legally "distinct entities ... engaged in a conspiracy to bring illegal workers into this country for Mohawk's benefit," the Eleventh Circuit concluded that together they constituted an association-in-fact enterprise. *Id.* at 7a-8a. The court further held that the respondents' conclusory allegation that "Mohawk participates in the operation and management of the affairs of the enterprise" was sufficient to plead operation or management. *Id.* at 8a (internal quotation marks omitted).

The Eleventh Circuit acknowledged that its interpretation of the RICO enterprise element conflicted with the Seventh Circuit's rejection of materially identical allegations in *Baker* v. *IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004). Pet. App. 9a. Like respondents here, the *Baker* plaintiffs sued a corporation under § 1962(c) for violating immigration laws by employing illegal aliens. The plaintiffs in *Baker* alleged a RICO enterprise that consisted of the corporation and third-party contractors that provided the corporation with employees. See *Baker*, 357 F.3d at 686-87. The *Baker* court held that such allegations were insufficient to plead that the defendant was conducting the affairs of a separate enterprise. See *id.* at 691. The Eleventh Circuit specifically rejected the Seventh Circuit's analysis. According to the panel below, respondents stated a RICO claim under the theory that "Mohawk played some part in directing the affairs of the enterprise" consisting of itself and its contractors and agents. Pet. App. 11a.

Mohawk filed a petition for rehearing *en banc*, which was denied. Pet. App. 73a. The district court, however, continued

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respondents received the wages for which they contracted. Pet. App. 22a-23a.

its stay of all proceedings pending this Court's review. *Id.* at 65a.

SUMMARY OF ARGUMENT

RICO is not a general criminal conspiracy statute or a basis for invoking federal jurisdiction over business torts. Instead, it is an "enterprise" statute aimed at persons who victimize separate enterprises or use them as a vehicle for criminal activity. To violate § 1962(c), the RICO defendant must be distinct from the RICO "enterprise" and that defendant must participate in the conduct of that distinct enterprise's affairs through a pattern of racketeering activity.

The Eleventh Circuit's approach would completely divorce RICO from its basic foundations. In the Eleventh Circuit, plaintiffs are able to assert a RICO claim against a corporation any time the corporation hires an agent or contractor or other legally separate entity to perform a task related to the subject of the claim. Once it is alleged that the contractor or agent is legally separate from the corporation, it is a simple matter to assert a RICO claim based upon a conclusory allegation that the corporation is "conducting" the affairs of a hypothetical enterprise consisting of the corporation and its agent. The holding below is contrary to the plain language and legislative history of RICO, the canon of construction embodied in the rule of lenity, and this Court's own precedents.

A.

At the outset, a corporation can never be part of an association-in-fact enterprise under § 1961(4). That particular form of "enterprise" can, by definition, only consist of a "group of individuals associated in fact." 18 U.S.C. § 1961(4). This additional category of "enterprise" was added to the definition to bring within the coverage of the statute people who participate in the conduct of "associations

in fact" such as organized crime families and criminal gangs. This "association-in-fact" definition may be broad, but it is not limitless: it is restricted to a "group of *individuals*." Under RICO, "individual" means a natural person, not a corporation or any other legal entity. Because Mohawk is not an "individual," respondents cannot invoke the association-in-fact doctrine to plead a RICO claim. The statute's use of the term "includes" to introduce the definition of enterprise does not change this conclusion, because the structure of § 1961(4) and other RICO provisions indicates that Congress intended the definition to be comprehensive.

B.

Even if Mohawk could be a member of an association-in-fact enterprise, it certainly could not form such an organization by contracting with recruiters. Such an "enterprise" fails for two reasons. First, respondents must allege an enterprise that is distinct from Mohawk itself. Specifically, a plaintiff must "prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 160 (2001). Second, respondents must allege facts indicating that Mohawk "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs." *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

The allegations in this case meet neither requirement. First, respondents have not alleged that the "enterprise" here has any existence separate and apart from the contractual association between Mohawk and its contractors. That contractual association is similar to the association between a corporation and its own employees—an association that universally has been rejected as an alleged "enterprise" separate from the corporation itself. Second, even if Mohawk and its contractors could form an "enterprise," Mohawk is not "conducting" the affairs of that separate enterprise, rather

than conducting its own affairs, when it seeks to obtain employees for its manufacturing business. Despite these limitations on the scope of RICO, Mohawk, like all other corporations, remains subject to prosecution if it were to engage in criminal activity. Corporations are subject to fines and substantial forfeitures under RICO's provisions and the other provisions of federal criminal law.

ARGUMENT

I. A CORPORATION CANNOT BE A CONSTITUENT OF AN ASSOCIATION-IN-FACT ENTERPRISE UNDER RICO.

A. An Association-In-Fact Enterprise Must Consist Of Individuals.

RICO defines the term "enterprise" to "includ[e] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Here, respondents have alleged "an association-in-fact enterprise" consisting of "Mohawk and [its] recruiters" JA 24 (Compl. ¶ 79). Such an allegation is not sufficient under RICO's definition of an association-in-fact enterprise as a "group *of individuals* associated in fact." 18 U.S.C. § 1961(4) (emphasis added).

1. Corporations Are Not "Individuals."

The term "individuals" refers only to natural persons, not corporations. In ordinary usage, the noun "individual" means "a single human being as contrasted with a social group or institution." *Webster's Third New International Dictionary of the English Language* 1152 (1969). See also *American Heritage Dictionary of the English Language* 670 (1970) ("A

single human being considered separately from his group or from society.").[5]

The plain meaning of "individual" as a natural person is reinforced by the structure of § 1961 as a whole. See *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Ass'ns., Ltd.*, 484 U.S. 365, 371 (1988) (a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). The distinction Congress drew between an "individual" and a legal entity is apparent in § 1961(3)'s definition of "person." That definition separately refers to "any individual or entity," indicating that "individual" refers to natural persons and not an "entity" like a corporation.

Likewise, § 1961(4) refers in its first clause to a series that includes "any individual" *or* "corporation" as types of legal persons that may constitute a RICO enterprise. If the term "individual" encompassed a corporation, there would be no need separately to list the latter entity. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)).

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[5] Although some (but not all) authorities indicate that the term "individual" occasionally is used to refer to entities, its primary and ordinary meaning refers to natural persons (particularly when "individual" is used as a noun). *See Black's Law Dictionary* 913 (4th ed. 1968) (while individual "very commonly" denotes "a private or natural person as distinguished from a partnership, corporation, or association," it may be used to refer to an artificial person "in proper cases"). As noted above, however, the use of that term in § 1961 as an alternative to entities and corporations makes plain that such arcane usage was not intended here. *See Mississippi Poultry Ass'n* v. *Madigan*, 9 F.3d 1113, 1114-15 (5th Cir. 1993) (explaining that "secondary or tertiary definitions" do not create ambiguity where the structure of a "carefully crafted statute" made clear that Congress intended the primary meaning).

The term "individual" is also used in the plural form in the second clause of § 1961(4), which refers to a "group of individuals associated in fact." The term "individuals" should have the same meaning in this instance—natural persons—that it has in the first clause of § 1961(4) and in § 1961(3). See *Reves*, 507 U.S. at 177 (giving "similar construction" to each use of the term "conduct" in § 1962(c)); *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 460 (1993) ("Presumptively, identical words used in different parts of [the] same act are intended to have the same meaning" (internal quotation marks omitted)). Accordingly, because the term "individual" refers to natural persons and not legal entities, a corporation may not be a constituent part of an association-in-fact enterprise.

Of course, under the first clause of § 1961(4), the corporation itself may be the enterprise. *See Cedric Kushner*, 533 U.S. at 164-65. However, the defendant person cannot also be the separate enterprise that it controls. *See infra* Section II.A.

Had Congress intended to define "enterprise" to capture an association in fact with a corporation as a constituent member, it could have easily done so. But it did not provide in § 1961(4) for a "group of persons," a "group of entities," a "group of individuals or entities," or a "group including any of the foregoing"—it only included a "group of individuals."[6] Congress' choice of the phrase "group of individuals" among a detailed list of seven different items leads to the "sensible inference that the term left out must have been meant to be excluded—*expressio unius est exclusio alterius*." *Chevron*,

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[6] In fact, Congress has included groups of corporations in other statutory definitions. *See* 42 U.S.C. § 2000e(a) ("The term 'person' includes *one or more* individuals, ... partnerships, associations, [or] corporations ...." (emphasis added)). "[T]his provision shows that Congress knew how to draft a [broader statute] when it wanted to." *City of Chi.* v. *Environmental Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted).

U.S.A., Inc. v. *Echazabal*, 536 U.S. 73, 81; *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). *See also* 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47:23 (6th ed. 2005) (explaining "there is an inference that all omissions should be understood as exclusions" "when the items expressed are members of an associated group or series, justifying the inference that the items not mentioned were excluded by deliberate choice").

The *expressio unius* inference has particular force here because Congress expressly included corporations in the first clause of § 1961(4), but not the second. "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." See *Environmental Def. Fund*, 511 U.S. at 338 (internal quotation marks omitted and alteration in original). The juxtaposition of the two clauses of § 1961(4) indicates that Congress made a "deliberate choice" not to include corporations as constituents of association-in-fact enterprises. *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

2. A "Group of Individuals" Is The Only Combination That Can Be An Association-In-Fact Enterprise.

That Congress defined "enterprise" using the verb "includes" does not provide a license to ignore the specific definition of enterprise that Congress constructed. 18 U.S.C. § 1961(4) ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact"). Section 1961(4) begins by stating that "enterprise" includes "any" individual or corporation or "other legal entity." Congress clearly used broad language in the first phrase of § 1961(4) to capture all legal entities. But, in the last phrase of the definition,

Congress employed a narrow and specific definition: "any union or group of individuals associated in fact."

Congress thus broke § 1961(4) into two separate clauses: the first—a list of legal entities—ends with the unlimited phrase "or other legal entities"; the second, which specifies the only non-legal-entity combinations that can be an enterprise, does not. This distinction would be unnecessary if Congress had intended to include combinations of entities and individuals as associations in fact. No fair reading of this language permits substitution of the phrase "group of entities" or "group of corporations" for "group of individuals" simply because the definition begins with the word "includes."

As Judge Friendly explained when confronting a similar definition, although "[d]efinitions in ... legislation often use the word 'include' out of abundant caution," "that does not afford carte blanche to 'include' [additional items], neither expressly mentioned nor within the normal meaning of the language, simply because a court may think this a good idea." *Willheim* v. *Murchison*, 342 F.2d 33, 42 (2d Cir. 1965). Although the word "includes" is often used illustratively to set forth an incomplete list of examples, "includes" should be interpreted as setting forth a complete list when "there appears to be no general principle in sight." *Dong* v. *Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir. 1997) (Williams, J.) (interpreting "includes" to introduce comprehensive definition of "agency"). Judge Friendly's interpretation of "includes" is consistent with the meaning of the term "includes," which may introduce a comprehensive, as opposed to a partial, list. See *American Heritage Dictionary of the English Language* 656 (1970) ("*[i]nclude* can be ... used" to "impl[y] that all of the components are stated"); *American Heritage College Dictionary* 701 (4th ed.

2002) (explaining that "*include* does not rule out the possibility of a complete listing").[7]

Any possible doubt here is removed by comparing § 1961(4), which says only "includes," to § 1964(a), which *twice* says "including, but not limited to." 18 U.S.C. § 1964(a) (using phrase "including, but not limited to" to clarify that the list that follows is incomplete and merely illustrative). When Congress wanted to indicate that a list in RICO was not comprehensive, it used the phrase "but not limited to." The absence of this phrase in § 1961(4) is telling.

In fact, RICO's comprehensive use of the term "includes" in § 1961(4) is consistent with each of its other uses in § 1961—all of which introduce comprehensive definitions. For example, § 1961(9) provides that "'documentary material' includes *any* book, paper, document, record, recording, *or other material.*" *Id.* § 1961(9) (emphases added). In this provision, the inclusion of the phrase "any ...

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[7] Whether "includes" should be interpreted as introducing a comprehensive list rather than an incomplete list of examples depends on the context of the particular statute in which it appears. *See Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934) (using context of statute to interpret "includes" phrase, in light of the fact that "includes" "may sometimes be taken as synonymous with 'means,'" and sometimes "is used as the equivalent of 'comprehends' or 'embraces'"). Interpreting "includes" as exemplary is appropriate when this language introduces a single example or an obviously incomplete listing. *See Echazabal*, 536 U.S. at 78-79 (listing only one example of what "qualification standards" "may include"); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188-89 (1941) (NLRB's broad power "to take such affirmative action ... as will effectuate the policies of this Act" modified by illustrative phrase "including reinstatement of employees with or without back pay" (internal quotations omitted)). An exemplary interpretation is also appropriate when a comprehensive reading would be inconsistent with the structure of the statute. *See Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). By contrast, "includes" should be read as introducing a comprehensive listing where it, as in § 1961(4), introduces a lengthy, carefully-drafted list and where no general meaning can be derived from the list. *See Dong*, 125 F.3d at 880.

other material" provides strong indication that the definition itself covers the full range of "documentary material," and thus "includes" is used in a comprehensive, not an exemplary sense. (Indeed, the use of the catchall phrase "or other material" would be superfluous if "includes" were merely introducing a collection of illustrations.) Likewise, § 1961(3) provides that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3). This is not a list of examples; it is a comprehensive definition. Similarly, it is hard to imagine that § 1961(10)'s definition of "Attorney General" uses "includes" in an exemplary sense. See *id.* § 1961(10) ("'Attorney General' *includes* the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter." (emphasis added)).

In prior cases concerning RICO enterprises, this Court has interpreted the term "includes" in § 1961(4) as a comprehensive term and focused on the specific language introduced by "includes." For example, this Court in *National Organization for Women* v. *Scheidler* reversed the lower court's holding that an enterprise must have an economic purpose. See 510 U.S. 249, 254 (1994). In that case, the respondents argued that § 1961(4)'s use of the term "includes" indicated that the definition of enterprise was only illustrative and that the plain meaning of the term "enterprise" should control. See Tr. of Oral Arg. at 33, *Scheidler*, 510 U.S. 249 (argued Dec. 8, 1993) (asserting that "[e]nterprise is illustrated in the statute, not defined" and thus the Court should look to "its common everyday meaning" of "business venture"); Resp. Brief for R. Terry et al. at 19-21, *Scheidler*, 510 U.S. 249 (filed Sept. 29, 1993) (urging dictionary and the

Fair Labor Standards Act definitions of enterprise which indicate that the term "enterprise" means an organization with an economic goal).

The *Scheidler* Court rejected the argument. In so holding, the Court treated "includes" comprehensively and refused to go beyond the definition of enterprise that Congress included in § 1961(4), reasoning that "Congress has not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive." *Scheidler*, 510 U.S. at 261. In short, the Court interpreted the statutory definition of enterprise as comprehensive and not illustrative, as the *Scheidler* respondents urged.

If there were any ambiguity about the scope of sections 1962(c) and 1961(4), the rule of lenity requires that it be resolved in favor of Mohawk. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 491 n.10 (explaining that 18 U.S.C. §§ 1961 and 1962 should be strictly construed under the rule of lenity). It is a bedrock principle that "statutes creating crimes are to be strictly construed." *United States* v. *Resnick*, 299 U.S. 207, 209 (1936). "RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment); see also, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 8 (2004) (rule of lenity applies to statutes that have both civil and criminal application). "[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). Under the rule of lenity, if § 1961(4) were ambiguous, it should be given its narrowest, reasonable reading. It is certainly reasonable to read § 1961(4)'s definition of "enterprise" as applying to combinations only of "any union

or group of individuals," and to hold that corporations are not "individuals."[8]

B. Limiting Association-In-Fact Enterprises To Groups Of Individuals Is Consistent With RICO's Legislative History And Purposes.

Congress' choice to limit association-in-fact enterprises to groups of individuals is in keeping both with RICO's purposes and structure. While "[i]n construing statutes," one "start[s] with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used," *INS* v. *Elias-Zacarias*, 502 U.S. 478, 482 (1992), that meaning is completely consistent with the legislative purpose behind association-in-fact enterprises. RICO's stated purpose was

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[8] Lower court decisions that have placed talismanic reliance on the term "includes" to arrive at a boundless definition of enterprise are wrongly decided. None of the bases for these decisions is persuasive. Some decisions assumed without any reasoning that "corporations" are "individuals." *See United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985) ("a group of corporations can be a 'group of individuals associated in fact'"). Others grafted language onto § 1961(4) that is plainly not there. *See Bunker Ramo Corp.* v. *United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) (adding to end of enterprise definition "and any combination of them"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1980) (approving of "enterprise" consisting of "'a group of individuals associated in fact with various corporations'"). In addition, many decisions erroneously employed RICO's liberal construction clause, *see United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979), which this Court has explained should yield to the rule of lenity in the context of § 1961, *see Sedima*, 473 U.S. at 491 n.10. Lastly, some decisions mistakenly relied on this Court's passing statement in *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), that "[t]here is no restriction upon the associations embraced by" § 1961(4). *See United States* v. *London*, 66 F.3d 1227, 1243 (1st Cir. 1995). The issue in *Turkette*, however, was whether "enterprise" is restricted to "legitimate enterprises." 452 U.S. at 579-80. The *Turkette* Court rejected the argument, and explained that there was "no restriction" of the sort. (The association-in-fact enterprise in that case was a criminal organization consisting solely of individuals. *See id.* at 580.)

"to seek the eradication of organized crime in the United States." See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). Among Congress' primary concerns were its findings that organized crime was using its influence "to infiltrate and corrupt legitimate business and labor unions" and that this corruption was "harm[ing] innocent investors and competing organizations." *Id.*

Indeed, RICO's history is replete with references to the fact that it was aimed at eradicating organized crime and gangs—which as organizations are brought within the Act's sweep by the "group of individuals associated in fact" provision in § 1961(4).[9] When initially introducing the provisions that would later be included in Title IX, Senator McClellan noted "the frustrat[ing] resul[t] when the only consequence of a

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[9] RICO was passed in 1970 as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. at 941. Senator John McClellan introduced the Organized Crime Control Act on January 15, 1969 as Senate Bill 30, but that bill did not initially include the provisions that would later become RICO. *See* 115 Cong. Rec. 827, 827-29 (1969). Instead, the RICO provisions were drawn from two other bills, Senate Bill 1623 (the Criminal Activities Profits Act, 91st Cong. (1969)), which was introduced by Senator Roman Hruska on March 20, 1969, and Senate Bill 1861 (the Corrupt Organizations Act of 1969, 91st Cong. (1969)), which were jointly introduced by Senators McClellan and Hruska on April 18, 1969. All three bills—along with other organized-crime-related provisions—were the subject of hearings before the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures during late March and early June of 1969. *See Measures Related to Organized Crime: Hearings Before the Senate Subcomm. on Criminal Laws & Procedures of the S. Comm. on the Judiciary*, 91st Cong. (1969). Senate Bill 1861 formed the basis for what would later be added as RICO into Senate Bill 30. *See* 116 Cong. Rec. 591, 591 (1970) (noting that "title IX of S. 30 [was] originally introduced as S. 1861"); 116 Cong. Rec. 585, 585 (1970) (remarks by Sen. McClellan describing the process of drafting Senate Bill 30). Some language from Senate Bill 1623 was also incorporated into the RICO provisions of Senate Bill 30. *See* S. Rep. 91-617, at 83 (1969).

conviction [of an individual mobster] is that organized crime and its infiltrated organizations are run by a new leader." 115 Cong. Rec. 9566, 9567 (1969). When those provisions were added as Title IX, he explained that "it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations." 116 Cong. Rec. 591, 591 (1970) (introducing amended S. 30). See S. Rep. No. 91-617, at 32 (1969) (Senate Report on the Organized Crime Control Act) (describing the Organized Crime Control Act as a "comprehensive, integrated program designed to deal with the menace of organized crime in the United States.").[10]

The legislative history consistently reflects congressional concern over the actions of "individuals" who were engaged in criminal enterprises, including the leaders of organized crime. See, *e.g.*, S. Rep. 91-617, at 42 (noting that "[o]rganized crime leaders moreover, have been notoriously successful in escaping punishment"). Specifically, in opening debate on the overall bill, Senator McClellan noted that "the most serious aspect of the challenge that organized crime poses to our society is the degree to which its members have succeeded in placing themselves above the law." 116 Cong. Rec. 585, 586 (1970). See also, *e.g.*, 116 Cong. Rec. 600, 602 (1970) (remarks of Sen. Hruska) (Title IX was "designed to remove the influence of organized crime from legitimate

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[10] *See also* S. Rep. No. 91-617, at 78 (S. 30) (noting while traditional criminal prosecutions had imprisoned "many ... notorious racketeers," "[n]ot a single one of the 'families' of La Cosa Nostra has been destroyed through criminal prosecutions"); 115 Cong. Rec. 39906, 39907 (1969) (explaining Title IX "would prohibit the infiltration of legitimate organizations by racketeers") (remarks by Sen. McClellan); *see also* J. Rakoff & H. Goldstein, *RICO: Civil And Criminal Law and Strategy* § 1.01, at 1-4 (2005) ("Congress enacted RICO in response to a fear of infiltration of legitimate commercial enterprises by traditional organized crime associations, a concern that dates back at least to ... the early 1950s.").

business by attacking its property interests and by removing its members from control of legitimate busines[s]"); S. Rep. No. 91-617, at 79 (noting that RICO was targeted at "individuals" and "the economic base through which those individuals constitute such a serious threat"); *id.* at 82 ("[P]arties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the public, these individuals must be prohibited from continuing to engage in this type of activity in any capacity.").[11] Given this concern, Congress drafted a definition of enterprise that contained a final category encompassing any "group of individuals" that was broad enough to ensure that RICO addressed the primary legislative concern over individuals who perpetrated enterprise crimes.

In contrast, RICO's history portrays corporations primarily as victims of organized crime. RICO was designed to clean up infiltrated corporations (and other organizations) through the prosecution of individual RICO defendants. See 116 Cong. Rec. at 602 (1970) (remarks of Sen. Hruska) (Title IX "contains a rather novel, and in my opinion, a most promising and ingenious proposal for crippling organized crime's relatively recent, but spectacularly successful, emergence into the field of legitimate business and unions"); S. Rep. 91-617, at 1 (the "money and power" of organized crime "are increasingly used to infiltrate and corrupt legitimate business and labor unions"); *id.* at 76-77 (detailing legislative findings that supported RICO focused on organized crime's perceived

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[11] *See also* 115 Cong. Rec. at 9567 (remarks of Sen. McClellan introducing Senate Bill 1861) (under RICO, "[i]f an organization is acquired or run by the proscribed racketeering method[s], then the persons involved are removed from the organization"); S. Rep. No. 91-617, at 37-40 (collecting tables detailing the hierarchical structure of particular mob families in the United States); Rakoff & Goldstein, *supra* §§ 1.02, 1.05 (explaining that, although generally worded, the design of RICO "reflects legislative findings that mobsters were infiltrating legitimate busines[s]").

"infiltration of legitimate businesses") (capitalization omitted); 116 Cong. Rec. at 592 (listing legitimate organizations infiltrated by organized crime). Thus, it is not surprising that Congress did not include a grouping of corporations in the definition of an association-in-fact enterprise.

In fact, Congress had earlier considered but did not pass a definition broad enough to include any combination involving a corporation. See S. 2187, 89th Cong. (1965). For years, Congress had considered how to draft a statute that would properly define criminal enterprises in a manner that encompassed organized crime. The "concept of 'enterprise criminalty' [sic] that RICO embodies ... owes its origin, in significant part, to Professor [Donald] Cressey's" Report commissioned by President Johnson's Task Force on Organized Crime. R. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 253 n.46 (1982). That report noted that "if 'organized crime' is to be controlled, legislatures must in the long run be able to define it as precisely as burglary or larceny or murder are now defined in criminal statutes." D. Cressey, *The Functions & Structure of Criminal Syndicates*, in *Task Force Report: Organized Crime* 25, 57 (The President's Comm'n on Law Enforcement & Admin. of Justice ed., 1967). Professor Cressey echoed the congressional focus on individuals, noting the failure of criminal law to properly define organized crime "permit[ted] directors of criminal business organizations to remain immune from arrest, prosecution, and imprisonment unless they themselves violate specific criminal laws." *Id.*

Professor Cressey's report also noted a prior unsuccessful legislative effort to define and combat organized crime: Senate Bill 2187. *See id.* at 59. That bill sought to outlaw membership in the Mafia or "any other organization having for one of its purposes" the commission of racketeering acts. S. 2187 § 2(a). In that bill, "'organization' mean[t] any

group, association, society, confederation, or syndicate whose aims, objectives, and purposes" included the commission of racketeering-type acts. *Id.* § 3(2). After the bill failed to garner support, RICO was drafted with the §1961(4) definition of enterprise that omitted the broad "any group" language contained in Senate Bill 2187.

Nothing in RICO's legislative history suggests Congress intended RICO "enterprises" to include unwieldy and difficult to parse associations-in-fact of corporations and their agents. Such associations—to the extent they exist—were irrelevant to the problems Congress was targeting. As Justice Alito has explained, RICO had "two aims": "to make it unlawful for *individuals* to function as members of organized criminal groups" and "to stop organized crime's infiltration of legitimate businesses." S. Alito, Jr. *Racketeering Made Simple(r)*, in *The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added). A mob family consisted of a "group of individuals," and thus is swept within § 1961(4) association-in-fact enterprise. Congress was also concerned about organized crime victimizing a corporation, but that problem is addressed by defining enterprise to include "any ... corporation."

In fact, Congress had good, practical reasons not to broaden the category of "association-in-fact" enterprises beyond what was necessary to target the problems at hand. An enterprise consisting of a single entity, such as a corporation or any of the other entities specifically enumerated in § 1961(4), is easy for courts to identify. See *Bennett* v. *Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982) ("'An enterprise is particularly likely to be found where ... the enterprise alleged is a legal entity rather than an 'associational enterprise.'").

But association-in-fact enterprises raise more difficult issues. In *United States* v. *Turkette*, this Court did provide some outlines of an association-in-fact enterprise, noting that it must be "an ongoing organization, formal or informal" where its members "function as a continuing unit" with "a

common purpose of engaging in a course of conduct," and the enterprise must be "separate and apart from the pattern of activity in which it engages." 452 U.S. 576, 583 (1981). But the lower courts have struggled to define this category of enterprise,[12] dividing, for example, over the proof necessary to show the required structure[13] and the meaning of *Turkette*'s "common purpose" requirement.[14] While these difficulties may to some degree reflect the lack of precision inherent in the phrase "group of individuals associated in fact," Congress included the category to ensure that the mob and criminal gangs fell within RICO's sweep. Nothing in RICO's text or legislative history suggests that this Court should expand the difficulties connected with defining association-in-fact enterprises to include associations in fact of corporations. At a minimum, if Congress had wanted every group involving a corporation to be an enterprise, it would have said so, as it said that a "group of individuals" could be an enterprise.

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[12] *See, e.g.*, 2 O. Obermaier & R. Morvillo, *White Collar Crime, Business and Regulatory Offenses* § 11.04[1], at 11-10 (2005) ("[m]uch of the controversy [over whether an enterprise exists] has centered on the catch-all provision—'associations-in-fact'"); *see also* Rakoff & Goldstein, *supra*, § 1.05, at 1-49 ("Most of the remaining controvers[ies] over the enterprise element of a RICO claim concerns the concept of a 'group of individuals associated in fact' included in the definition.").

[13] *See, e.g., Chang* v. *Chen*, 80 F.3d 1293, 1297 (9th Cir. 1996) ("Turkette does not specify how much structure an organization must have to be an enterprise under RICO. This issue has divided the circuit courts that have considered it.").

[14] *Compare, e.g.*, Pet. App. 8a ("the common purpose of making money was sufficient under RICO"), *with Baker*, 357 F.3d at 691 (no common purpose because "IBP wants to pay lower wages; the recruiters want to be paid more for services rendered (though IBP would like to pay them less) .... These are divergent goals").

II. A CORPORATION DOES NOT CONDUCT OR PARTICIPATE IN THE CONDUCT OF THE AFFAIRS OF A DISTINCT ENTERPRISE BY CONTRACTING FOR ITS OWN BUSINESS ACTIVITIES.

Assuming for the sake of argument that an association-in-fact enterprise can sometimes include legal entities such as a corporation, this Court should narrowly restrict such a combination to one with an existence and activities that are clearly distinct from a member corporation. The allegations in this case are plainly insufficient because they violate two fundamental limitations on RICO liability. First, the RICO defendant must be distinct from the enterprise whose affairs the defendant conducts. See *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161 (2001). Second, the defendant must *conduct* (or participate in the conduct of) the affairs of *an enterprise* with which the defendant is "employed ... or associated"—not merely its own affairs. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

The Eleventh Circuit's opinion below ignores both these limitations on the scope of RICO and improperly allows plaintiffs to pursue claims against a corporation by alleging that the corporation entered into routine business relationships to perform the activities of the corporation. Thus, contrary to § 1961(4), almost any group involving a corporation or other legal entity can be a RICO "enterprise," and almost any alleged corporate conspiracy is a ripe target for a treble damages civil suit.[15]

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[15] These same concerns also support adopting an interpretation of "enterprise" that limits an association-in-fact enterprise that contains legal entities to circumstances where the "group" has functions and activities that are distinct from those of its member entities. Absent such a limitation, § 1961(4) would have to be interpreted such that every "group" that contains an entity could qualify as an enterprise in exactly the same way that every "group of individuals" could qualify as an enterprise. That improper reading would mean that Congress' decision expressly to

In this case, respondents did not and could not allege any enterprise whose purpose and activities were distinct from those of Mohawk. Respondents allege they were harmed by Mohawk's hiring practices. Hiring its own employees is a classic internal function of a company. Such an undertaking does not create a distinct enterprise nor is it conducting a separate enterprise's affairs. The court's holding is contrary to the plain language of RICO, ignores this Court's RICO precedents, and expands RICO well beyond all reasonable limits.

A. Under § 1962(c), A RICO Defendant Must Conduct Or Participate In The Conduct Of A Distinct Enterprise.

In *Cedric Kushner*, this Court held that, under the plain language of § 1962(c), a RICO defendant (*i.e.*, a RICO "person") must be distinct from the RICO enterprise. See 533 U.S. at 160. Section 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." As this Court explained, "[i]n ordinary English one speaks of employing, being employed by, or associating with others, not oneself." *Cedric Kushner*, 533 U.S. at 161. Therefore, to recover under § 1962(c), a plaintiff must "prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Id.* at 158. In addition, RICO liability requires that the defendant have "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs," *Reves*, 507 U.S. at 185. Thus, RICO requires both an enterprise that is distinct from the defendant and that the defendant direct the affairs of that distinct enterprise through the illegal conduct.

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include a "group of individuals" in § 1961(4) had no practical consequences and was mere surplusage.

The textual distinction between the RICO "person" and "enterprise" reflects an important goal of § 1962: the elimination of the corrupting influence on enterprises by persons who have unlawfully infiltrated or directed enterprises to engage in racketeering activities. As this Court has explained, "[t]he enterprise in ... subsections (a) and (b)" of § 1962 "is the victim of unlawful activity" and "the 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed." *Scheidler*, 510 U.S. at 259. In short, the enterprise is either the victim or tool of the illegal activity and is, therefore, distinct from the wrongdoer, the RICO "person."

In practice, the limitations recognized in *Cedric Kushner* and *Reves* have restricted plaintiffs' ability to sue corporations as RICO defendants because those entities logically would tend to be the victim or vehicle of the RICO persons, not the RICO persons themselves.[16] As this Court has noted, "Whether the [RICO] Act seeks to prevent a person from victimizing, say, a small business, or to prevent a person from using a corporation for criminal purposes, the person and the victim, or the person and the tool, are different entities, not the same." *Cedric Kushner*, 533 U.S. at 162 (citations omitted). Moreover, this limitation ensures that RICO's harsh penalties (including treble damages) are visited upon those individuals who misuse a corporation and not upon the company's shareholders or innocent employees. See, *e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. at 922-23 ("The Congress finds that ...

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[16] This "distinctness" requirement does not prevent RICO from being used to pursue corporate wrongdoing. *See infra* II.E. Wrongdoers who misuse corporations can be held civilly and criminally liable under RICO, with the wrongdoers named as defendants and the corporation as the enterprise. In fact, that was precisely what happened in *Cedric Kushner*. There, the enterprise was a corporation and the RICO defendant was its president and shareholder. 533 U.S. at 160. This Court upheld the RICO claim. *Id.* at 163.

organized crime activities in the United States ... harm innocent investors ...."); 116 Cong. Rec. at 591 (remarks of Sen. McClellan) (noting that, "[i]n business, the mob bleeds a firm of assets, then takes bankruptcy"); Rakoff & Goldstein, *supra* § 6.04 ("Congress sought by forfeiture not only to increase economic sanctions but also to separate the defendant from control of the 'enterprise' and enjoyment of its profits.").

B. The Lower Courts Have Properly Rejected "Enterprises" That Consist Of A Corporation And Legally Separate Parties Or Entities That Merely Assist In Performing The Corporation's Functions And Activities.

Some RICO plaintiffs have attempted to meet the requirement of a "distinct" enterprise by naming a corporation as a defendant and alleging that the enterprise is an "association-in-fact" of the corporation plus third parties.[17] Thus, plaintiffs have attempted to sue a corporation by alleging it conducted a "distinct" enterprise consisting of it and its legally separate employees. As this Court noted in *Cedric Kushner*, an "owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." 533 U.S. at 163. Nonetheless, all seven Circuits to consider the issue have properly rejected claims that the combination of a corporation and its employees is distinct from the corporation itself.[18] Such an alleged

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[17] In both *Reves* and *Cedric Kushner* the alleged enterprise was a single corporation, not an association in fact. *Cedric Kushner*, 533 U.S. at 161; *Reves*, 507 U.S. at 172.

[18] *See, e.g., Bessette* v. *Avco Fin. Servs., Inc.*, 230 F.3d 439, 449 (1st Cir. 2000) ("employees acting solely in the interest of their employer, carrying on the regular affairs of the corporate enterprise, are not distinct from that enterprise"); *Anatian* v. *Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85 (2d Cir. 1999) (employees together with defendant corporation

enterprise is not only an "oddly constructed entity," *id.* at 164, but it makes little sense to speak of a corporation being distinct from an "enterprise" consisting of the corporation and its employees, because corporations can only act through individual employees. See, *e.g.*, *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("a corporation can only function through its employees and agents"). Stated differently, a corporation does not conduct the affairs of some other enterprise when it acts through its employees or agents. Instead, such a corporation is conducting its own affairs.

Other RICO plaintiffs have tried to circumvent the *Cedric Kushner* and *Reves* requirements of a "distinct" enterprise by alleging that the RICO enterprise consists of a corporation and its legally separate parent or subsidiary. As then-Judge Breyer recognized for the First Circuit, such an enterprise is not distinct from either the parent or the subsidiary because such allegations do not "charge that [the two corporations] were conducting some *other* unlawful enterprise." *Arzuaga-*

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cannot constitute an enterprise); *Gasoline Sales, Inc.* v. *Aero Oil Co.*, 39 F.3d 70, 73 (3d Cir. 1994) ("a corporation generally cannot be a defendant under section 1962(c) for conducting an 'enterprise' consisting of its own subsidiaries or employees, or consisting of the corporation itself in association with its subsidiaries or employees"); *Parker & Parsley Petroleum Co.* v. *Dresser Indus.*, 972 F.2d 580, 583 (5th Cir. 1992) (explaining that an association-in-fact of a corporation's employees is nothing more than the "defendant corporate entity functioning through its employees in the course of their employment"); *Bachman* v. *Bear Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) ("A firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself."); *Board of County Comm'rs* v. *Liberty Group*, 965 F.2d 879, 885 (10th Cir. 1992). *See also Living Designs, Inc. v. E.I. Dupont de Nemours & Co.* 431 F.3d 353, 361 (9th Cir. 2005) (dicta) ("if the 'enterprise' consisted only of DuPont and its employees, the pleading would fail for lack of distinctiveness"); Rakoff & Goldstein, *supra* § 7.04[2], at 7-36 ("*Respondeat superior* cannot be used to circumvent the requirement under Section 1962(c) that the defendant and enterprise must be distinct.").

Collazo v. *Oriental Fed. Sav. Bank*, 913 F.2d 5, 6 (1st Cir. 1990) (Breyer, C.J.). In other words, because the corporations were not alleged to have "conducted the affairs" of "some other, larger, unlawful 'enterprise'" the alleged enterprise was not sufficiently "distinct" from the defendants to state a claim. *Id.* Thus, the court in *Arzuaga-Collazo* rejected the plaintiffs' attempt to transform "a claim that one would normally expect them to pursue in state court" into a racketeering case. *Id.* at 7.[19]

In sum, the lower courts have consistently rejected allowing an "enterprise" to include combinations involving a corporation and its natural business relationships, such as its employees or parent or subsidiary corporations. The fundamental reason is that any other approach would constitute a "broad rule ... [that] would allow the application of RICO in every fraud case against a corporation." *Brannon* v. *Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1147 (10th Cir. 1998). The same is true when the proposed "enterprise" is the combination of a corporation and third parties for the purpose of performing the corporation's own functions or activities.

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[19] Seven other courts of appeals have rejected similar end-runs around RICO's distinctness requirement. *See Bucklew* v. *Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003); *Fogie* v. *THORN Ams., Inc.*, 190 F.3d 889, 898 (8th Cir. 1999); *Brannon* v. *Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1148-49 (10th Cir. 1998); *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998); *Gasoline Sales, Inc.* v. *Aero Oil Co.*, 39 F.3d 70, 73 (3d Cir. 1994); *NCNB Nat'l Bank* v. *Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), *overruled on other grounds by Busby* v. *Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987).

C. Mohawk Does Not Conduct Or Participate In The Conduct Of The Affairs Of A Distinct Enterprise When It Contracts For Third Parties To Assist In Recruiting Mohawk's Own Employees.

Mohawk (like any company) can only acquire a workforce through the recruitment efforts of its employees and others. Indeed, many corporations have a personnel or human resources department that has as one of its primary functions recruiting employees. In acquiring part of its workforce allegedly by contracting with recruiters, Mohawk is not conducting some separate enterprise. To the contrary, Mohawk is conducting its own business. As such, it is not "employed by or associated with" some other enterprise as RICO requires. 18 U.S.C. § 1962(c); see *Cedric Kushner*, 533 U.S. at 160. As previously noted, respondents have not and could not allege that any of the recruiters were the enterprise or that Mohawk conducted their affairs.[20] Nor by such efforts does Mohawk either "conduct or participate ... in the conduct of [an] enterprise's affairs." *Id.* As this Court has explained, "liability [under RICO] depends on showing that the defendan[t] conducted or participated in the conduct of the '*enterprise*'s affairs,' not just [its] *own* affairs." *Reves*, 507 U.S. at 185.

Respondents' own allegations demonstrate that Mohawk did not direct the affairs of an enterprise that is separate and distinct from Mohawk itself. Respondents contend that the company's relationship with recruiters "exists for Mohawk's benefit." JA 23 (Compl. ¶ 78). Respondents further claim that the "common purpose" of the relationship was to "obtai[n] illegal workers for employment by Mohawk." JA 23 (Compl. ¶ 77). As noted, *ante* at 6-7, almost the entirety

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[20] Moreover, respondents could not allege that they suffered a proximately caused injury as a result of participation in the affairs of a recruiting company.

of the conduct alleged in the complaint concerns acts by Mohawk and its employees alone, which respondents allege are "part of [Mohawk's] regular way of conducting business." JA 22 (Compl. ¶ 73). Indeed, respondents' alleged injuries (from the "suppression" of wages) are indisputably caused by Mohawk's actions in conducting its own affairs—*i.e.*, in setting the hourly wages it pays to its employees.

Respondents' central claim against Mohawk (and the basis for respondents' alleged injury) is that Mohawk allegedly recruited and hired unauthorized workers. Hiring, however, is a quintessential corporate function, since a corporation must act through natural persons. As the Seventh Circuit pointed out in rejecting materially identical allegations, "[t]he nub of the complaint is that [the defendant] operates *itself* unlawfully—it is [the defendant] that supposedly hires, harbors, and pays the unlawful workers." *Baker* v. *IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (Easterbrook, J.).

Nothing in RICO indicates that liability under that Act should turn on the size, sophistication, or outsourcing choices of a company. As noted above, the circuit courts unanimously agree that if the alleged recruiters were employees or subsidiaries of the corporation, Mohawk's use of recruiters would not constitute participation in the conduct of an enterprise distinct from the corporation itself, even though employees and subsidiaries are separate legal entities from a corporation. Every hiring case should not be turned into a federal RICO case simply because of a business decision to use a non-employee to accomplish a portion of the same corporate function.

To be sure, it is possible for a corporation to violate § 1962(c) where some truly distinct entity is the enterprise and the corporation unlawfully conducts the affairs of that distinct entity. But respondents do not allege that any of the agencies or recruiters were themselves enterprises, much less that Mohawk conducted their affairs through the alleged predicate acts. The only enterprise alleged is an association

in fact between Mohawk and these recruiters. There is no claim that Mohawk has any relationship with recruiters other than an arms-length business arrangement. See JA 23 (Compl. ¶ 76) ("Each recruiter is paid a fee for each worker it supplies to Mohawk ....."). Such a relationship is not a separate enterprise within the meaning of RICO.

The Eleventh Circuit's approach would turn many garden-variety tort cases into federal RICO cases, merely because the corporation chose to use a legally separate individual or entity to perform a corporate function or activity. Consider a small business that employs a few individuals, but does not have the resources to hire a general counsel. Suppose that the small business uses a local attorney to prepare bank loan applications. If a corporation together with this attorney constitute a distinct "enterprise," then the business would be open to a RICO suit alleging that the loan applications were fraudulent—simply because it used an outside attorney to prepare those applications.[21] See 18 U.S.C. § 1961(1)(B) (RICO predicate acts include fraud against financial institutions). Conversely, if a larger company with an in-house lawyer (who is an employee) engaged in precisely the same actions, RICO would not apply. The company plus the employee lawyer would not constitute an enterprise distinct from the company itself. In neither case, however, would the company "conduct" the affairs of some separate enterprise—on the contrary, each company is conducting its own affairs.

Again, this is not to say that RICO cannot be implicated in the relationship between an individual or a corporation and a law firm. The popular book *The Firm* described a situation that is precisely what RICO is aimed at eliminating. See J. Grisham, *The Firm* (1991). There individuals associated with organized crime infiltrated and corrupted an entire law firm,

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[21] This concern is not fanciful. *See, e.g., Living Designs*, 431 F.3d at 369-70 (holding that corporation and outside law firms representing it in litigation may constitute RICO enterprise).

which then seemingly engaged in the ordinary practice of law, but in fact promoted the underlying illegal purposes of an organized crime group. The law firm was the enterprise. Here, respondents do not allege that the employment agencies are the enterprise, much less an enterprise infiltrated by Mohawk. They allege only that the enterprise exists in the arms-length association between Mohawk and its recruiters. This arrangement is one that RICO does not regulate.

Likewise, suppose that a bank hired a local accountant to assist it in advising clients about loan consolidation. Under the Eleventh Circuit's reasoning, the bank could be subject to a civil RICO suit alleging that it committed mail and wire fraud and conducted a RICO enterprise consisting of a grouping of it and the local accountant. If, however, a larger bank used an in-house accountant, this staffing would once again remove all potential RICO liability. RICO's application, then, would turn on the size of the corporation, its resources, and its determination to rely upon outside expertise, rather than on the substance of the conduct at issue.

On its face, this example is similar to the allegations held insufficient in *Reves*. In that case, the alleged enterprise was the company itself, and this Court held that the outside accounting firm was not liable under RICO because its preparation of financial statements did not "direc[t] th[e] affairs" of the company. *Reves*, 507 U.S. at 179. In the wake of *Reves*, plaintiffs have attempted to circumvent its force by alleging association-in-fact enterprises consisting of both the company and an accounting firm or similar third party.[22] Indeed, such hypothetical enterprises are not dissimilar than the one alleged in the instant case: a company plus a service provider that the company pays on a fee-for-service basis.

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[22] *See, e.g., Discon*, 93 F.3d at 1064 (alleging association-in-fact enterprise of corporations and their "'attorneys, accountants, and other agents'"), *vacated on other grounds*, 525 U.S. 128 (1998).

As the Seventh Circuit has observed, allowing RICO liability to turn on the vagaries of corporate organization would create a perverse incentive for companies to insulate themselves from the prospect of treble damages RICO strike suits by vertically integrating tasks previously performed by third-party agents. See *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997) (Posner, C.J.) ("What possible difference, from the standpoint of preventing the type of abuse for which RICO was designed, can it make that Chrysler sells its products to the consumer through franchised dealers rather than through dealerships that it owns ... ?"). Nothing in RICO requires that liability turn on such meaningless distinctions. A corporation that contracts for assistance with its own functions or activities from a non-employee is not participating in the conduct of the affairs of some distinct enterprise merely because the alleged enterprise consists of the two together.[23] In short, the enterprise "must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation." *Brittingham* v. *Mobile Corp.*, 943 F.2d 297, 301 (3d Cir. 1991), *overruled on other grounds, Jaguar Cars, Inc.* v. *Royal Oaks Motor Co., Inc.*, 46 F.3d 258 (3d Cir. 1995).

The critical distinction is whether the corporation is conducting the distinct affairs of another corporation or some separate new enterprise, or whether the corporation is simply using another organization to assist the corporation in its own

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[23] *See Baker*, 357 F.3d at 691-92 (determining that no construction of the defendant corporation together with its agents constituted a proper RICO enterprise); *Fitzgerald*, 116 F.3d at 228 (refusing to conclude that an enterprise consisting of subsidiaries, dealers, and financial institutions controlled by the defendant was properly pled); *Discon*, 93 F.3d at 1064; *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991) (concluding the distinctness requirement "would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf"), *overruled on other grounds, Jaguar Cars, Inc.* v. *Royal Oaks Motor Co., Inc.*, 46 F.3d 258 (3d Cir. 1995).

affairs (legal or otherwise). Here, respondents have not alleged that Mohawk somehow corrupted another organization; they rather alleged that Mohawk was operating itself unlawfully, by using recruiters and employment agencies to help Mohawk carry out its own function and activity of hiring workers. Hiring employees is a core corporate function—indeed, in a manufacturing business like Mohawk's, hiring employees is at the very heart of Mohawk's conduct of its own business. Respondents have simply not alleged that Mohawk conducted the affairs of a distinct enterprise, and therefore their § 1962(c) claim must be dismissed.

D. The Eleventh Circuit's Separate Legal Entity Test Is Inconsistent With This Court's Interpretations of RICO's Text And Purposes.

The separate legal entity test that the Eleventh Circuit used to determine that respondents sufficiently alleged a RICO enterprise is incompatible with any sensible interpretation of RICO. Indeed, the Eleventh Circuit's test effectively negates the "enterprise" requirement by finding an "enterprise" whenever legally separate entities allegedly conspired in any way. According to the Eleventh Circuit, an "enterprise" requires no more than "the existence of an association of individual entities, however loose or informal." Pet. App. 7a (quoting *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000)). Therefore, it was enough in this case for respondents to plead that "Mohawk and the third-party recruiters are distinct entities" who allegedly were "engaged in a conspiracy." *Id.* at 7a-8a. In the Eleventh Circuit's view, any conspiracy or other "loose or informal" association between legally separate entities creates an association-in-fact enterprise. This cannot be the law.[24]

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[24] The Sixth Circuit has used a similarly deficient test. *See Davis* v. *Mutual Life Ins. Co. of N.Y.*, 6 F.3d 367, 377-78 (6th Cir. 1993) (determining that RICO defendant insurance company was distinct from

The Eleventh Circuit's talismanic reliance on whether the alleged enterprise contains parties that are legally separate entities from the RICO defendant makes little sense. Indeed, this rule is inconsistent with the decisions that unanimously reject enterprises consisting of a company and its employees or a parent and subsidiary, even though both an employee and a subsidiary are legally separate from a corporation. See *supra* Section II.B. But the legal separation between corporation and employee is not enough to create an enterprise separate from the corporation.

Instead, whether a defendant corporation conducts or participates in the conduct of a distinct RICO enterprise requires an analysis of whether the corporation is "employed by" or "associated with" a separate enterprise and whether, through the alleged acts of racketeering, the corporation participates in the conduct of the affairs of that enterprise, not just its own affairs. See 18 U.S.C. § 1962(c). When the circuit courts have hewed closely to this statutory analysis, they have repeatedly held that a corporation—whether it acts through its employees, subsidiaries, or others—does not create and direct a distinct enterprise under § 1962(c) merely because it contracts and conducts its own business affairs with and through such parties. It is simply not enough for the corporation to direct its own affairs through a series of alleged predicate acts concerning the recruitment, hiring and compensation of the company's own employees—even if service contractors are involved in that conduct.

The sort of RICO enterprise that respondents have pled here is therefore patently deficient; there are no allegations that Mohawk managed or controlled the affairs of the employment agencies, and the allegations do not show that Mohawk was directing the affairs of an association-in-fact enterprise with its own separate set of activities and functions.

"enterprise" of insurance agency selling defendant's policies because the insurance agency was a "distinct entity" with a separate legal existence).

Rather, the only allegation is that Mohawk conducted its own affairs through a pattern of immigration violations and on occasion used employment agencies on a fee basis to recruit employees. This is not actionable under RICO.

Indeed, myopically focusing on whether the corporation and the other alleged enterprise members are merely legally separate subverts the purpose of RICO. Section 1962(c) was narrowly crafted to target wrongdoers who were misusing enterprises to carry out a pattern of racketeering activity. RICO sanctions are therefore "directed at the persons who conduct the racketeering activity, rather than the enterprise through which the activity is conducted." *Brittingham*, 943 F.2d at 301. Targeting "enterprises" that are functionally indistinct from the persons conducting them transforms RICO from a statute focused on the misuse of organizations into a general conspiracy statute imposing civil liability (with treble damages) whenever a corporation conspires with some service provider that the corporation hires.

Given the many torts that are classified as "racketeering violations," see 18 U.S.C. § 1961(1), the substantive limits of § 1962(c) must be enforced to prevent an explosion of RICO civil strike suits targeting corporations for treble damages awards. See *Reves*, 507 U.S. at 183 (§ 1962(c)'s requirements are a "critical limitation" on the scope of RICO). "RICO ... is not a conspiracy statute," *Fitzgerald*, 116 F.3d at 228; rather, it only extends to "the acquisition or operation of an enterprise," *Reves*, 507 U.S. at 182. Congress did not intend for RICO to be an indiscriminate tool to sue corporations for conducting their own affairs, but this is precisely what results from the Eleventh Circuit's formalistic application of the "separate legal entity" test, which recognizes an "enterprise" whenever a corporation contracts with another entity.

E. Properly Interpreting RICO Will Not Impair Its Use Against Criminal Wrongdoing.

Neither properly interpreting the definition of enterprise nor enforcing the requirement of participation in the conduct of a distinct enterprise (as set forth above) will impair RICO's usefulness as a tool to attack corporate wrongdoing. In the first place, the persons engaging in the wrongful conduct—the officers and managers who direct a corporation to engage in racketeering activity—will always be appropriate § 1962(c) defendants when they conduct the affairs of that corporation through a pattern of racketeering activity.[25] And a corporation that conducted its own affairs through a pattern of racketeering offenses of course could be held criminally liable for the underlying offenses.

Moreover, like any other RICO person, a corporation can violate § 1962(c) by conducting the affairs of a legal entity that is distinct from the corporation itself. To vary the example from Section II.C above, if the corporation that used agents to falsify its own bank loan applications had instead systematically bribed bank officials as part of a scheme to influence decisions on bank loan applications, that corrupt direction of the bank's affairs could be a § 1962(c) violation.

Sections 1962(a) and (b) provide additional avenues to target corporate crime. Section 1962(a) prohibits "any person [including a corporation] who received any income ... from a pattern of racketeering activity" from "us[ing] or invest[ing], directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise." As a result, a corporation involved in racketeering activity can be

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[25] Such wrongdoers face substantial criminal penalties, including imprisonment of up to 20 years, fines of up to $250,000 or twice the gross pecuniary gain from the offense (whichever is greater), and forfeiture of any interest in the enterprise and any interest acquired through the RICO violation. *See* 18 U.S.C. § 1963(a); *id.*§ 3571.

prosecuted for using any proceeds from that activity to acquire and operate an enterprise. In addition, corporations can be prosecuted under § 1962(b) for using racketeering activity to acquire or maintain "any interest in or control of any enterprise."

Alleging § 1962(a) and (b) violations may be a less popular tack for civil plaintiffs than alleging § 1962(c) violations, because plaintiffs must show that a corporation's use of racketeering proceeds injured their business or property. But all of § 1962's provisions are and will remain powerful tools in the government's arsenal against corporations who engage in racketeering activity. In addition to subjecting companies to substantial fines, RICO has an extensive criminal forfeiture provision, requiring a corporation to forfeit all property obtained (even indirectly) from racketeering activity. See 18 U.S.C. § 1963(a) (2), (3) (requiring forfeiture of all "property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity" and any "interest in ... any enterprise"). See also Alito, *supra*, at 8 ("RICO contains very broad, innovative, and highly effective forfeiture provisions.").

In sum, RICO provides broad remedies to address the conduct at which it was targeted: conducting "'organizations in a manner detrimental to the public interest.'" *Cedric Kushner*, 533 U.S. at 165 (quoting S. Rep. No. 91-617, at 82). What it does not provide is license for civil plaintiffs to sue ad hoc associations in fact that never were contemplated in § 1961(4), particularly when those alleged enterprises only consist of a defendant corporation conducting its own business affairs with the arms-length assistance of third parties.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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(11)

Supreme Court, U.S.
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No. 05-465

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 05-465 Petition For A Writ Of Certiorari at the following pages.

Williams v. *Mohawk Inds., Inc.*, 411 F.3d 1252 (11th Cir. 2005) 1a-23a

Williams v. *Mohawk Inds., Inc.*, 314 F. Supp. 2d 1333 (N.D. Ga. 2004) 24a-61a

Williams v. *Mohawk Inds., Inc.*, No. 4:04-CV-0003-HLM (N.D. Ga. Aug. 18, 2005) (order staying discovery) 62a-66a

Williams v. *Mohawk Inds., Inc.*, No. 04-90017-B (11th Cir. July 28, 2004) (order granting petition for interlocutory appeal) 67a

Williams v. *Mohawk Inds., Inc.*, No. 4:04-CV-0003-HLM (N.D. Ga. May 27, 2004) (order certifying case for interlocutory appeal) 68a-72a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

4:04-cv-00003

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES and LORA SISSON, individually and on behalf of a class,
Plaintiffs,

versus

MOHAWK INDUSTRIES, INC.,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
01/06/2004	1	COMPLAINT filed and summons(es) issued. Consent form to proceed before U.S. magistrate and pretrial instructions given to attorney; jury demand; FILING FEE $ 150.00; RECEIPT # 364113 (jta) (Entered: 01/06/2004)
		* * * *
04/12/2004	44	ORDER by Judge Harold L. Murphy: GRANTING IN PART AND DENYING IN PART [25-1] motion to dismiss action by Mohawk; specifically, the Court DENIES deft's motion to dismiss as to all Federal and Georgia RICO allegations in plas' complaint, DENIES deft's motion to dismiss as to plas' unjust enrichment claim as it relates to deft's wage savings in employing plas at a diminished wage rate, and GRANTS deft's motion to dismiss as to plas' unjust respect to worker's compensation claims. (cc) (bjj) (Entered: 04/12/2004)

DATE	NO.	PROCEEDINGS
		* * * *
04/23/2004	46	MOTION by deft Mohawk Industries to amend [44-1] order of the Court re deft's motion to dismiss to permit interlocutory appeal and for stay of discovery with Memo of Law in support. (bjj) (Entered: 04/23/2004)
		* * * *
05/07/2004	51	Response by plaintiffs to deft's [46-1] motion to amend [44-1] order of the Court re deft's motion to dismiss to permit interlocutory appeal and for stay of discovery. (bjj) (Entered: 05/07/2004)
05/07/2004	—	SUBMITTED to Judge Harold L. Murphy on deft's [46-1] motion to amend [44-1] order of the Court re deft's motion to dismiss to permit interlocutory appeal and for stay of discovery, with plas' [51-1] response. (bjj) (Entered: 05/07/2004)
		* * * *
05/24/2004	56	Reply by deft Mohawk Industries in support of its [46-1] motion to amend [44-1] order of the Court re deft's motion to dismiss to permit interlocutory appeal and for stay of discovery. (bjj) (Entered: 05/24/2004)
		* * * *
05/27/2004	58	ORDER by Judge Harold L. Murphy: GRANTING deft's [46-1] motion to amend [44-1] Order of the Court re deft's motion to dismiss to permit interlocutory appeal and for stay of discovery w/out prejudice as to issues re class certification until the Elev-

DATE	NO.	PROCEEDINGS
		enth Circuit disposes of the interlocutory appeal; the Court AMENDS the April 12th, 2004 Order to provide that deft may seek interlocutory review of said Order pursuant to 28 U.S.C.A. Section 1292(b). (cc) (bjj) (Entered: 05/27/2004)
08/04/2004	59	COPY OF ORDER from USCA GRANTING permission to Appeal pursuant to 28 U.S.C. 1292(b). USCA #04-90017-B (bj) (Entered: 08/06/2004)
08/04/2004		NOTICE OF INTERLOCUTORY APPEAL by dft as to 59 order by USCA granting permission to appeal pursuant to 28 U.S.C. 1292(b). Filing fee $255, receipt number 364523. Transcript Order Form due on 8/18/2004 (bj) (Entered: 08/06/2004)
		* * * *
07/29/2005	61	MOTION to Lift the Stay of Discovery 58 Order, with Brief In Support by Shirley Williams, Gale Pelfrey, Bonnie Jones, Lora Sisson. (Attachments: #1 Exhibit A# 2 Exhibit B)(Thorpe, Joshua) (Entered: 07/29/2005)
08/11/2005	62	MOTION for Order—Defendant's Motion to Continue the Stay of Discovery Pending Its Petition for Certiorari with Brief In Support by Mohawk Industries, Inc., (Attachments: #1)(Cannon, R.) (Entered: 08/11/2005)
08/15/2005	63	RESPONSE in Opposition re 62 MOTION for Order—Defendant's Motion to Continue the Stay of Discovery Pending Its Petition

DATE	NO.	PROCEEDINGS
		for Certiorari filed by Shirley Williams, Gale Pelfrey, Bonnie Jones, Lora Sisson. (Thorpe, Joshua) (Entered: 08/15/2005)
		* * * *
08/18/2005	67	REPLY to Response to Motion re 62 MOTION for Order—Defendant's Motion to Continue the Stay of Discovery Pending Its Petition for Certiorari—Defendant's Reply in Support of Its Motion to Continue the Stay of Discovery Pending Its Petition for Certiorari filed by Mohawk Industries, Inc., (Cannon, R.) (Entered: 08/18/2005)
08/18/2005	68	ORDER denying as moot Plaintiffs' 61 Motion to Lift the Stay of Discovery and granting Deft Mohawk Industries, Inc.'s 62 Motion to Continue the Stay of Discovery pending its Petition for Certiorari. The Court STAYS discovery in this case until the Supreme Court either (a) denies Deft's petition for a writ of certiorari or (b) decides the case on the merits after granting Deft's pettion. Signed by Judge Harold L. Murphy on 8/18/05. (bjj) (Entered: 08/19/2005)
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

04-900017-B
04-13740-AA

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES and LORA SISSON, individually and on behalf of a class,
Plaintiffs-Appellees,

versus

MOHAWK INDUSTRIES, INC.,
Defendant-Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS	PARTY	PENDING
07/28/2004	Probable Jurisdiction Noted:	Mohawk Industries Inc.	No
	* * * *		
06/09/2005	Judgment Entered		No
	* * * *		
06/09/2005	Opinion Issued AFFIRMED IN PT/REVERSED IN PT/& REMANDED.		No
	* * * *		

DATE	PROCEEDINGS	PARTY	PENDING
08/08/2005	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.		No
	* * * *		
08/16/2005	CASE CLOSED-Mandate Issued		No
	* * * *		
10/17/2005	Notice of Filing Certiorari: 05-465 (Atty: Steven T. Cottreau)	Mohawk Industries Inc.	No
	* * * *		
12/27/2005	Certiorari Granted limited to Question 1 (SC# 05-165):	Mohawk Industries Inc.	No
	* * * *		

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

[Filed Jan. 5, 2004]

Civil Action File No. 4 04-CV-03
Complaint—Class Action

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES and LORA SISSON, individually and on behalf of a class,
Plaintiffs,

vs.

MOHAWK INDUSTRIES, INC.,
Defendant.

COMPLAINT

Plaintiffs Shirley Williams ("Williams"), Gale Pelfrey ("Pelfrey"), Bonnie Jones ("Jones") and Lora Sisson ("Sisson"), individually and on behalf of a class, bring this action against Defendant Mohawk Industries, Inc. ("Mohawk"):

I. SUMMARY OF CLAIMS

1.

This is a class action under the federal and Georgia Racketeer Influenced and Corrupt Organizations ("RICO") acts. The members of the class are current and former hourly employees of Mohawk whose wages have been depressed by Mohawk's employment and harboring of large numbers of illegal workers. Plaintiffs seek injunctive and monetary relief on behalf of Mohawk's legally-employed hourly workers in Georgia.

2.

Mohawk is the second largest carpet and rug manufacturer in the United States. In 2002, its carpet and rug net sales were approximately $3.2 billion. Mohawk employs approximately 31,780 persons, most of whom are employed in Northwest Georgia. Mohawk owns or leases at least twenty-six facilities in Georgia.

3.

Mohawk has, in its Georgia facilities, engaged in the widespread employment of illegal workers, *i.e.*, workers who are not authorized to be employed in the United States. By employing and harboring illegal workers, Mohawk is able to reduce labor costs by depressing wages for its hourly workers and discouraging claims for workers compensation.

4.

Mohawk's conduct violates the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("federal RICO"), and Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq.* ("Georgia RICO"), as more fully set forth below.

II. PARTIES, JURISDICTION AND VENUE

5.

Plaintiff Gale Pelfrey is a citizen of Georgia and resides in the Northern District of Georgia. She is eligible to be employed in the United States and is a former hourly employee of Mohawk.

6.

Plaintiff Shirley Williams is a citizen of Georgia and resides in the Northern District of Georgia. She is eligible to be employed in the United States and is a former hourly employee of Mohawk.

7.

Plaintiff Bonnie Jones is a citizen of Georgia and resides in the Northern District of Georgia. She is eligible to be employed in the United States and is a current hourly employee of Mohawk.

8.

Plaintiff Lora Sisson is a citizen of Georgia and resides in the Northern District of Georgia. She is eligible to be employed in the United States and is a former hourly employee of Mohawk.

9.

Defendant Mohawk is a Delaware corporation with its principal place of business in Calhoun, Georgia. Mohawk may be served by service on its registered agent for service of process, Salvatore J. Perillo, Post Office Box 12069, South Industrial Boulevard, Calhoun, Georgia 30703.

10.

Mohawk is subject to the personal jurisdiction of this Court.

11.

This Court has subject matter jurisdiction over this case pursuant to 18 U.S.C. § 1964(c), 28 U.S.C. § 1332 (federal question) and 28 U.S.C. § 1367 (ancillary jurisdiction).

12.

Venue is proper in this district, pursuant to 28 U.S.C. § 1391(b), as Mohawk resides in this district and events giving rise to Plaintiffs' claims occurred in this district. Venue is also proper in this district pursuant to 18 U.S.C. § 1965, as Mohawk resides, is found in and transacts its affairs in the Northern District of Georgia.

III. FACTS

Mohawk's Hiring and Harboring of Illegal Workers

13.

Mohawk employs many thousands of hourly paid workers in its operations in North Georgia.

14.

In an effort to keep labor costs as low as possible, Mohawk has engaged in the illegal hiring of persons who are not eligible for employment in the United States.

15.

Mohawk has accepted for employment and continued to employ workers that it knew or had reason to know were not authorized to work in the United States.

16.

Mohawk has knowingly and recklessly accepted as proof of eligibility for employment false documents or documents that do not match the identity of the person presenting them. For example, Mohawk has accepted drivers' licenses and other documents that obviously depict a person different than the person presenting the document as proof of eligibility for employment.

17.

Mohawk also has knowingly and recklessly accepted as proof of eligibility for employment documents that reflect successive different names for a single person. Indeed, Mohawk frequently employs illegal workers who (a) first present eligibility documents that reflect one name, (b) work at Mohawk for some period of time, (c) leave their jobs at Mohawk, and then (d) return to work at Mohawk and present Mohawk with identification and work eligibility documents showing a different name.

18.

In some instances, when illegal workers have informed Mohawk that they would return to their countries of origin, Mohawk supervisors have encouraged these employees to return to the United States and reapply for work at Mohawk in violation of United States law.

19.

Although Mohawk was and is aware that numerous employees have used or are using identities different from those they had previously used while employed at Mohawk, Mohawk has accepted and continues to accept new identification and work authorization documents that it knew or had reason to know were false or obtained by false statements from these persons.

20.

Mohawk employees and/or supervisors have destroyed eligibility documents showing that workers have used different names and identification papers in an effort to conceal Mohawk's employment and harboring of illegal workers.

21.

Mohawk employees and supervisors have stated that they are aware that illegal workers can easily obtain false identification and work authorization documents.

22.

Mohawk employees have traveled to the United States border, including areas near Brownsville, Texas, to recruit undocumented aliens that recently have entered the United States in violation of federal law. These employees and other persons have transported undocumented aliens from these border towns to North Georgia so that those aliens may procure employment at Mohawk. Mohawk has made various

incentive payments to employees and other recruiters for locating workers that Mohawk eventually employs and harbors.

23.

Various recruiters, including Mohawk employees, have provided housing to these illegal workers upon their arrival in North Georgia and have helped them find illegal employment with Mohawk.

24.

Mohawk has conducted occasional audits of its workforce and discovered numerous illegal workers within that workforce. Although these infrequent audits often confirm the presence of large numbers of illegal workers and therefore put Mohawk on further notice that it is employing and harboring illegal workers, Mohawk has not increased the frequency of these audits.

25.

Even when Mohawk terminates illegal workers after discovering that they are not authorized to work in the United States, many of those discharged illegal workers soon return to work at Mohawk under different names. For example, earlier this year, Mohawk discharged three employees that Mohawk had discovered to be illegally working in one of its facilities. Within two months after their discharge, Mohawk re-hired these same employees under different names to work on different shifts in the same facility.

26.

This practice of "recycling" illegal workers is widespread at Mohawk.

27.

Law enforcement personnel have raided Mohawk facilities in pursuit of undocumented aliens. On some of these occasions, illegal workers have hidden in barrels or other con-

tainers or run from the facilities being raided. This conduct has put Mohawk on further notice of the presence of large numbers of illegal workers in its workforce.

28.

Mohawk employees and supervisors have assisted illegal workers in attempting to evade detection by law enforcement personnel.

29.

Law enforcement authorities have arrested illegal workers at Mohawk facilities.

30.

Law enforcement authorities have found undocumented aliens in possession of Mohawk paychecks or identification badges and fraudulent identification documents.

31.

Mohawk supervisors have stated that they prefer hiring illegal workers because they do not complain about working conditions or submit claims for workers' compensation.

32.

Because illegal workers typically have no intention of filing federal tax returns, many illegal workers inflate their claimed exemptions to attempt to avoid withholding taxes. Many of Mohawk's illegal workers have inflated their claimed exemptions to avoid federal income tax withholding. This conduct has further put Mohawk on notice that large numbers of its workforce are not authorized for employment in the United States.

33.

Mohawk's employment and harboring of large numbers of illegal workers has enabled Mohawk to depress wages and thereby to pay all of its hourly employees, including legally

employed workers who are members of the class, wages that are lower than they would be if Mohawk did not engage in this illegal conduct.

34.

Mohawk is the second largest carpet manufacturer in the United States and one of the largest employers in North Georgia. Mohawk employs tens of thousands of hourly workers in North Georgia.

35.

Mohawk's widespread employment and harboring of illegal workers has substantially and unlawfully increased the supply of workers from which Mohawk makes up its hourly workforce. This unlawful expansion of the labor pool has permitted Mohawk to depress the wages that it pays all its hourly employees, including the Plaintiffs and all Class members. If Mohawk had complied with the law by limiting its hourly workforce to those workers authorized to work in the United States, Mohawk would have had to pay higher wages to the Plaintiffs and the members of the Class.

36.

One purpose and intended effect of Mohawk's widespread employment and harboring of illegal workers is to deprive Mohawk's hourly workforce of any individual or collective bargaining power. Because Mohawk knows that many of its workers are not authorized to reside or work in the United States, Mohawk knows that those illegal workers are beholden to Mohawk. Mohawk is further aware that its undocumented workers have virtually no effective means to complain about the terms of their employment.

37.

Mohawk also is aware that its illegal employees are unlikely to file worker's compensation claims against Mohawk. As a direct and proximate result of Mohawk's employment

and harboring of illegal workers, Mohawk has been able to save substantial sums of money in worker's compensation liability that it would have incurred if it had not violated the law.

38.

As a direct and proximate result of Mohawk's employment and harboring of illegal workers, Plaintiffs and all members of the Class have earned wages below the wages they would have earned if Mohawk had complied with the law.

IV. CLASS ACTION ALLEGATIONS

39.

Plaintiffs bring this action on behalf of all persons legally authorized to be employed in the United States who are or have been employed by Mohawk in hourly wage positions in Georgia at any time from January 5, 1999 to the present (the "Class"). The "Class Period" is from January 5, 1999 to the present.

40.

The Class is so numerous that joinder of all Class members is impracticable. Plaintiffs believe the Class contains many thousands of members, and the actual number of Class members can be ascertained through discovery.

41.

There are numerous questions of law and fact common to the Class. Those questions include, but are not limited to:

a. How many persons who are not authorized to be employed in the United States has Mohawk employed in hourly wage positions during the Class Period?

b. Has Mohawk knowingly or with reckless disregard employed workers who are not authorized for employment in the United States during the Class Period?

c. Has Mohawk knowingly or recklessly harbored undocumented aliens in the United States in violation of federal law during the Class Period?

d. To what extent has Mohawk's employment and harboring of persons who are not authorized to be employed in the United States in hourly wage positions depressed the wages Mohawk provides to legal hourly employees?

e. Is Mohawk part of an "enterprise" under the federal RICO statute? and

f. Has Mohawk engaged in a pattern of racketeering activity under the federal RICO statute or acquired and maintained and [sic] interest in a pattern of racketeering activity under the Georgia RICO statute?

42.

The claims of the Plaintiffs are typical of the claims of the Class. Plaintiffs are or were hourly workers whose wages have been depressed by Mohawk's employment and harboring of illegal workers. Plaintiffs have no interests that are antagonistic or adverse to the other Class members.

43.

Plaintiffs were injured by direct and proximate reason of Mohawk's illegal conduct.

44.

Plaintiffs will fairly and adequately protect the interests of the class.

45.

Plaintiffs are adequate representatives of the Class. Plaintiffs are each authorized for employment in the United States and are or were hourly Mohawk workers, whose wages have been depressed by Mohawk's employment and harboring of

illegal workers. Plaintiffs have retained counsel that are experienced in class action litigation, RICO litigation and complex litigation. Accordingly, Plaintiffs will fairly and adequately protect and represent the interests of the Class.

46.

Plaintiffs seek certification of a class, alternatively, under Fed. R. Civ. P. 23(b) (2) or 23(b) (3), or a combination thereof.

47.

Mohawk's employment and harboring of illegal workers has the effect of depressing wages and benefits to the detriment of all members of the Class. Accordingly, declaratory and injunctive relief that prevents Mohawk from continuing to employ or harbor illegal workers is appropriate on a class wide basis.

48.

The questions of law and fact common to all members of the Class predominate over any questions that may affect only individual members of the Class.

49.

A class action is a superior method of adjudicating the Class members' claims because individual actions would unnecessarily burden the Court and create the risk of inconsistent results.

50.

Given the significant expense required to prosecute the foregoing claims against Mohawk, the costs of individual actions would exceed or consume the amount recovered in any individual action. The expense of pursuing individual actions will require individual members of the Class to forego their individual claims against Mohawk if they are not permitted to pursue those claims as a Class.

51.

Plaintiffs are not aware of any litigation concerning this controversy that has already been initiated by or against any members of the Class.

52.

Because both Mohawk and the large majority of the Class members reside in this district and many of the events giving rise to this action took place in this district, it is both desirable and efficient to concentrate the litigation of these claims in this particular forum.

53.

This action is manageable because the evidence proving that Mohawk is engaging in the alleged conduct is common to the Class. Furthermore, the identities of the Class members are known to Mohawk.

V. MOHAWK HAS ENGAGED IN A PATTERN OF RACKETEERING ACTIVITY

54.

Mohawk is engaged in an ongoing pattern of racketeering activity as defined by 18 U.S.C. § 1961(5).

55.

The federal RICO pattern of racketeering activity engaged in by Mohawk consists of more than two acts of racketeering activity, the most recent of which occurred within ten years after the commission of a prior act of racketeering activity.

56.

Mohawk is engaged in an ongoing pattern of racketeering activity as defined by O.C.G.A. § 16-14-3(8).

57.

The Georgia RICO pattern of racketeering activity engaged in by Mohawk consists of more than two acts of racketeering activity, the most recent of which occurred within four years after the commission of a prior act of racketeering activity.

58.

For purposes of federal RICO, the racketeering activity includes an open and ongoing pattern of violations of Section 274 of the Immigration and Nationality Act, 8 U.S.C. § 1324(a).

59.

Specifically Mohawk has violated and continues to violate 8 U.S.C. § 1324(a)(3)(A), which makes it a federal crime to: "knowingly hire[] for employment at least 10 individuals with actual knowledge that the individuals are aliens . . ." during a 12 month period. Mohawk has violated this provision of the Act, including by employing more than 10 aliens per year each year for the last four years, knowing that each such person was (a) smuggled or otherwise brought into the United States in violation of U.S. law; (b) illegally harbored once in the United States; (c) not lawfully admitted to the United States for permanent residence; and/or (d) not authorized for employment in the United States.

60.

Mohawk has also violated and continues to violate 8 U.S.C. § 1324(a)(1)(A)(iii), which makes it a federal crime to "conceal,[], harbor[] or shield from detection, or attempt[] to conceal, harbor or shield from detection . . ." aliens who have entered the U.S. illegally. Mohawk has violated this provision by (a) knowingly employing illegal aliens within its factories, warehouses and other facilities in Georgia and/or (b) taking steps to shield those illegal aliens from detection, by, among other things, helping them evade detection during law enforcement searches and inspections.

61.

Furthermore, Mohawk has also violated and continues to violate 8 U.S.C. § 1324(a)(1)(A)(iv), which prohibits any person or entity from "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law[.]" By knowingly or recklessly employing and harboring undocumented aliens in its Georgia facilities, Mohawk has helped hundreds of aliens to avoid detection and enabled them to remain in the United States in violation of U.S. law. And by successively hiring and employing the same undocumented aliens under different names and accepting false identification and work authorization documents that reflect different identities for these aliens, Mohawk has knowingly or recklessly encouraged any undocumented aliens that are discovered to return to the United States and to their employment at Mohawk in violation of United States law.

62.

Each violation of 8 U.S.C. § 1324 constitutes an act of "racketeering activity" under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(F).

63.

For purposes of both federal and Georgia RICO, the racketeering activity also includes open and ongoing violations of 18 U.S.C. § 1546(a), including Mohawk's acceptance of identification documents and other documents that authorize employment in the United States that Mohawk knew or had reason to know were not lawfully issued for the bearer's use, were false and/or were obtained by false statements.

64.

Mohawk has also violated and continues to violate 18 U.S.C. § 1546(b) by using identification documents that Mo-

hawk knew or had reason to know were false and/or not lawfully issued to the bearer to falsely verify the eligibility of the persons presenting them to work at Mohawk, and recording information from those documents on I-9 forms.

65.

Each violation of 18 U.S.C. § 1546 constitutes "racketeering activity" under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(B).

66.

Each violation of 18 U.S.C. § 1546 also constitutes "racketeering activity" under the Georgia Racketeer Influenced and Corrupt Organizations Act. O.C.G.A. § 16-14-3(9)(A)(xxix).

The Acts of Racketeering Activity Committed by Mohawk Are Related

67.

The acts of racketeering activity committed by Mohawk have the same or similar methods of commission in that they involve the knowing employment of illegal workers, the concealment, harboring and shielding from detection of illegal workers, and the acceptance or use of fraudulent documents in connection with the hiring of illegal workers.

68.

The acts of racketeering activity committed by Mohawk have the same or similar objective: the reduction of wages paid to Mohawk's hourly workforce.

69.

The acts of racketeering activity committed by Mohawk have the same or similar victims, including the plaintiffs and the other members of the Class.

70.

The acts of racketeering activity committed by Mohawk are otherwise related by distinguishing characteristics including, but not limited to, the involvement of Mohawk, illegal workers, and other members of the association-in-fact enterprise identified in paragraphs 76-84.

The Acts of Racketeering Activity Committed by Mohawk Involve a Distinct Threat of Long-Term Racketeering Activity

71.

Mohawk's acts of racketeering activity involve a distinct threat of long-term racketeering activity.

72.

Mohawk's practice of knowingly employing, harboring, concealing and shielding illegal workers and Mohawk's acceptance and use of documents that are not lawfully issued for the use of the possessor or are false has continued for years, is ongoing at the present time and will continue into the future unless halted by judicial intervention.

73.

Mohawk's knowing employment, harboring, concealing and shielding of illegal workers and its acceptance and use of documents that are not lawfully issued for the use of the possessor or are false is part of its regular way of conducting business.

74.

Mohawk has committed hundreds, and probably thousands, of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 as part of its pattern of racketeering activity.

75.

Mohawk's knowing employment, harboring, concealing and shielding of illegal workers and its acceptance and use of

documents that are not lawfully issued for the use of the possessor or are false is so pervasive that illegal workers now constitute a majority of the work force in many of Mohawk's facilities in North Georgia.

VI. THE ENTERPRISE

76.

Mohawk has engaged in an open and ongoing pattern of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 during the last five years through its participation in an association-in-fact enterprise with third party employment agencies and other recruiters, including Temporary Placement Services ("TPS"), that supply Mohawk with illegal workers. Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity.

77.

The recruiters and Mohawk share the common purpose of obtaining illegal workers for employment by Mohawk. The enterprise has worked in this fashion continuously over at least the last five years.

78.

Mohawk participates in the operation and management of the affairs of the enterprise, which exists for Mohawk's benefit.

79.

This association of Mohawk and the recruiters constitutes an association-in-fact enterprise pursuant to 18 U.S.C. § 1961(4).

80.

The enterprise affects interstate commerce in a variety of ways.

81.

The enterprise affects interstate commerce in that the illegal workers employed by Mohawk travel in international and interstate commerce in order to reach Mohawk facilities in North Georgia.

82.

The enterprise also affects interstate commerce in that it reduces the income of the legal workers who are still part of the Mohawk hourly workforce.

83.

The enterprise also affects interstate commerce in that Mohawk, a member of the enterprise, is directly engaged in the production, distribution and acquisition of goods and services in interstate commerce.

84.

Mohawk accepted and retained the benefits of the acts of racketeering activity, thereby ratifying the conduct of its managers, employees, and the members of the enterprise who assisted it in committing those acts of racketeering activity.

VII. MOHAWK HAS CAUSED PLAINTIFFS' WAGES TO BE DEPRESSED

85.

Mohawk's violations of federal and Georgia RICO proximately have caused the wages of Pelfrey, Williams, Jones, Sisson and all other members of the Class to be depressed below what they would have been in a labor market comprised of legally employed workers.

86.

Pelfrey, Williams, Jones, Sisson and the Class have suffered an injury to their "business or property," *i.e.* lost wages, as a direct result of Mohawk's violations of federal RICO, and injury as a result of Mohawk's violations of Georgia RICO.

87.

Mohawk's unlawful conduct has allowed Mohawk to earn or retain significant funds to which it is not entitled. For example, Mohawk's widespread employment of illegal workers has permitted Mohawk to depress the wages for its hourly workers and to reduce the expenses it incurs as a result of worker's compensation claims. These savings contribute to Mohawk's profit margins and provide the financial motive for Mohawk's hiring of illegal workers.

COUNT I

(Violation of 18 U.S.C. § 1962(c))

88.

Plaintiffs reallege and incorporate by reference herein the allegations set forth in paragraphs 1-87 as if fully restated hereinafter.

89.

The foregoing conduct constitutes a violation of 18 U.S.C. § 1962(c).

90.

Plaintiffs have been injured in their property by reason of Mohawk's violations of 18 U.S.C. § 1962(c).

91.

The injuries suffered by plaintiffs were caused by Mohawk's violations of 18 U.S.C. § 1962(c).

92.

Pursuant to 18 U.S.C. § 1964(c), plaintiffs are entitled to recover threefold the damages they have sustained and their costs of suit, including reasonable attorney's fees.

COUNT II

(Violation of O.C.G.A. § 16-14-4(a))

93.

Plaintiffs reallege and incorporate by reference herein the allegations set forth in paragraphs 1-92 as if fully restated hereinafter.

94.

Mohawk has acquired and maintained an interest in and control of personal property, including money, through a pattern of racketeering activity.

95.

Plaintiffs have been injured by reason of Mohawk's violation of O.C.G.A. § 16-14-4(a) and are entitled to recover three times the actual damages sustained.

96.

In addition, Mohawk's actions showed wilfull misconduct, malice, fraud, wantonness, oppression and an entire want of care that raises the presumption of conscious indifference to consequences and specific intent to cause harm, entitling plaintiffs to receive punitive damages sufficient to deter, pen-

alize, or punish Mohawk in light of the circumstances of the case.

97.

Plaintiff are also aggrieved persons within the meaning of O.C.G.A. § 16-14-6(b). As a result, Plaintiffs are entitled to appropriate preliminary and permanent injunctive relief.

98.

Pursuant to O.C.G.A. § 16-14-6(a), plaintiffs ask the Court to issue appropriate orders and judgment requiring Mohawk to cease its illegal conduct and imposing reasonable restrictions upon Mohawk's future activities sufficient to prohibit future violations of the law.

COUNT III

(Violation of O.C.G.A. § 16-14-4(c))

99.

Plaintiffs reallege and incorporate by reference herein the allegations set forth in paragraphs 1-98 as if fully restated hereinafter.

100.

Mohawk has endeavored to violate O.C.G.A. § 16-14-4(a), in violation of O.C.G.A. § 16-14-4(c).

101.

Mohawk has also conspired with TPS and other recruiters, known and unknown, to violate O.C.G.A. § 16-14-4(a), in violation of O.C.G.A. § 16-14-4(c).

102.

Mohawk has committed overt acts, which are also acts of racketeering activity, in furtherance of the conspiracy. These overt acts include violations of 18 U.S.C. § 1546.

103.

Mohawk has also committed overt acts in furtherance of the conspiracy by having Mohawk employees travel in interstate commerce for the purpose of assisting Mohawk in hiring illegal workers.

104.

Mohawk's actions show wilfull misconduct, malice, fraud, wantonness, oppression and an entire want of care that would raise the presumption of conscious indifference to consequences, and specific intent to cause harm, entitling plaintiffs to receive punitive damages sufficient to deter, penalize or punish Mohawk.

105.

Mohawk's violations of federal and Georgia RICO are intended to and do in fact depress wages, and the Class is the direct victim of these violations.

COUNT IV

(Unjust Enrichment in Violation of Georgia Law)

106.

Plaintiffs reallege and incorporate by reference herein the allegations set forth in paragraphs 1-105 as if fully restated hereinafter.

107.

Mohawk's employment and harboring of illegal workers has had the purpose and effect of depressing the wages paid to Mohawk's hourly workers who are eligible for employment in the United States. Mohawk's conduct therefore is intended to and has the effect of permitting Mohawk to reap substantial wage savings.

108.

Mohawk's employment and harboring of illegal workers also has had the purpose and effect of reducing the number of worker's compensation claims that Mohawk receives. Mohawk supervisors have stated that they prefer hiring illegal workers in part because they do not submit worker's compensation claims. Mohawk's conduct therefore is intended to and has the effect of permitting Mohawk to limit the amount it must spend to respond to worker's compensation claims.

109.

The savings that Mohawk has been able to achieve and continues to achieve through its employment and harboring of illegal workers have been unjustly and inequitably conferred on Mohawk at the expense of its hourly workers who are authorized for employment in the United States, including Plaintiffs and all other members of the Class. These cost savings permit Mohawk to earn larger profits than it would be able to earn if it did not employ and harbor illegal workers.

110.

Under the circumstances, Mohawk has been unjustly enriched at the expense of the Plaintiffs and all the members of the Class. Mohawk therefore should be ordered to disgorge its unlawful profits or otherwise return the full amount of any wage savings and worker's compensation savings that are the direct and proximate result of Mohawk's unlawful conduct.

XIII. PRAYER FOR RELIEF

Plaintiffs Pelfrey, Williams, Jones and Sisson demand judgment and other relief as follows:

A. Certification of a Class pursuant to Fed. R. Civ. P. 23;

B. Judgment in an amount equal to three times the actual damages sustained by the Class, pursuant to 18 U.S.C. § 1964(c);

C. Reasonable attorney's fees, pursuant to 18 U.S.C. § 1964(c);

D. Judgment in an amount equal to three times the actual damages sustained by the Class, pursuant to O.C.G.A. § 16-14-6(c);

E. Attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred, pursuant to O.C.G.A. § 16-14-6(c);

F. Appropriate orders and judgments prohibiting Mohawk from engaging in the violations of law alleged herein, pursuant to O.C.G.A. § 16-14-4(a) and (b);

G. Judgment in an amount to be proven at trial that requires Mohawk to disgorge any unlawful profits or otherwise return the full amount of its unjust enrichment;

H. Trial by jury; and

I. Such other relief as the Court deems just and proper.

This 6th day of January, 2004.

Respectfully submitted

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No. 05-465

In the Supreme Court of the United States

MOHAWK INDUSTRIES, INC., PETITIONER

v.

SHIRLEY WILLIAMS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an association between (a) a corporation that is alleged to have engaged in the systematic hiring and employment of illegal workers and (b) outside recruiters who are alleged to have assisted in those practices can constitute an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, imposes criminal and civil liability for specified forms of racketeering activity committed by a "person" in connection with an "enterprise." The United States frequently brings criminal and civil enforcement actions under RICO. This case presents the question whether and under what circumstances a corporation, together with outside recruiters who are alleged to have facilitated the corporation's unlawful employment practices, can form a RICO "enterprise." Because the United States frequently initiates suits in which a corporation is alleged to be a constituent member of a RICO "enterprise," the United States has a substantial interest in the Court's resolution of this case.

STATEMENT

1. RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. 1962(c). RICO's definitional section states that the term "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). The term "racketeering activity" is defined to encompass acts that are indictable under, *inter alia*, 18 U.S.C. 1546 or Section 274 of the Immigration and Nationality Act. See 18 U.S.C. 1961(1)(A) and (F) (2000 & Supp. II 2002). A person who violates RICO is subject to criminal penalties, see 18 U.S.C. 1963, and to civil liability, see 18 U.S.C. 1964(c).

2. On January 6, 2004, respondents filed suit against petitioner on behalf of a putative class of petitioner's current or former hourly employees who are legally authorized to work in the United States. See J.A. 7-31 (Complaint). The complaint alleged that petitioner had "engaged in the widespread employment of illegal workers, *i.e.*, workers who are not authorized to be employed in the United States," J.A. 8, and that petitioner's employment practices constituted a "pattern of racketeering activity" within the meaning of 18 U.S.C. 1961(5) because petitioner "ha[d] committed hundreds, and probably thousands, of violations of 8 U.S.C. § 1324(a) and 18 U.S.C. § 1546," J.A. 22; see J.A. 18-23. The complaint further alleged that petitioner had committed those violations through "an association-in-fact enterprise with third party employment agencies and other recruiters * * * that supply [petitioner] with illegal workers." J.A. 23. The complaint explained that

recruiters are paid a fee for workers supplied to petitioner; that recruiters provide a pool of employees for petitioner's work needs; that some recruiters locate workers in Texas and transport them to Georgia; that other recruiters employ illegal workers themselves and then transport them to petitioner for a fee; and that "[t]hese recruiters are sometimes assisted by [petitioner's] employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity." *Ibid.* The complaint further alleged that "[t]he recruiters and [petitioner] share the common purpose of obtaining illegal workers for employment by [petitioner]"; that "[t]he enterprise has worked in this fashion continuously over at least the last five years"; and that petitioner "participates in the operation and management of the affairs of the enterprise." *Ibid.*

3. The district court denied petitioner's motion to dismiss respondents' RICO claims. Pet. App. 24a-61a. Petitioner contended, *inter alia*, that respondents had not adequately alleged the existence of a RICO "enterprise." The district court rejected that contention, see *id.* at 40a-48a, and certified its ruling for interlocutory appeal, see *id.* at 68a-72a.

4. The court of appeals granted petitioner's request for permission to appeal under 28 U.S.C. 1292(b), see Pet. App. 67a, and affirmed in relevant part, *id.* at 1a-23a.

The court of appeals held that the numerous and ongoing violations of federal immigration law alleged in respondents' complaint would constitute a "pattern of racketeering activity" for purposes of RICO. See Pet. App. 5a-6a. The court further held that respondents had "sufficiently alleged an 'enterprise' under RICO; that is an association-in-fact between [petitioner] and third-party recruiters." *Id.* at 7a. The court explained that "[petitioner] and the third-party recruiters are distinct entities that, at least according to the complaint, are engaged in a conspiracy to bring illegal workers into this

country for [petitioner's] benefit. As such, the complaint sufficiently alleges an 'enterprise' under RICO." *Id.* at 7a-8a. The court also held that the complaint had adequately alleged a common purpose among the members of the enterprise, in light of the allegations that "the members of the enterprise stand to gain sufficient financial benefits from [petitioner's] widespread employment and harboring of illegal workers." *Id.* at 8a. Finally, the court of appeals stated that respondents had "sufficiently alleged that [petitioner] is engaged in the operation or management of the enterprise." *Id.* at 8a-9a.

The court of appeals acknowledged (Pet. App. 9a-10a) that in *Baker* v. *IBP, Inc.*, 357 F.3d 685, 690-691, cert. denied, 543 U.S. 956 (2004), the Seventh Circuit had held that substantially similar allegations did not state a claim under RICO because those allegations suggested the existence of divergent goals among the members of the purported "enterprise." The court of appeals declined to adopt the *Baker* court's approach, however, explaining that in the Eleventh Circuit "there has never been any requirement that the 'common purpose' of the enterprise be the sole purpose of each and every member of the enterprise." Pet. App. 10a. The court concluded: "In this case, the complaint alleges that [petitioner] and the recruiters, under [petitioner's] direction, worked together to recruit illegal workers to come to Georgia and that they had the common purpose of providing illegal workers to [petitioner] so that [petitioner] could reduce its labor costs and the recruiters could get paid. This commonality is all that this circuit's case law requires." *Ibid.*

SUMMARY OF ARGUMENT

1. As used in RICO, the term "enterprise" encompasses a de facto alliance among corporations or similar artificial legal entities. Although such associations are not specifically mentioned in 18 U.S.C. 1961(4), Section 1961(4) is introduced

by the word "includes" and is intended to provide an illustrative rather than an exhaustive roster of RICO "enterprise[s]." That construction of the statutory term accords with common usage and established legal principles: the word "enterprise" is often used to refer to collaborative ventures that do not involve the creation of a discrete legal entity, and corporations are generally deemed capable of entering into agreements (including illicit agreements) on the same terms as natural persons. Petitioner's reliance on the rule of lenity is misplaced, both because Congress has directed that RICO is to be liberally construed, and because no serious ambiguity exists as to whether a de facto association of corporations can constitute a RICO "enterprise." The government's criminal and civil enforcement efforts under RICO would be significantly impaired if the only associations in fact that could be treated as RICO enterprises were those composed exclusively of individuals.

II. Respondents' complaint adequately alleged that petitioner and outside recruiters had entered into a de facto alliance having the essential attributes—a common purpose and a continuing organizational presence—of a RICO associated-in-fact enterprise. More is alleged here than a contract between legally distinct entities. Rather, the complaint alleged that distinct business entities entered into a longstanding arrangement designed to facilitate the repeated commission of racketeering crimes. Such an alliance is properly regarded as an associated-in-fact RICO enterprise, even if the terms of the arrangement are determined through arms-length negotiations between the parties. The fact that a corporation's liability under 18 U.S.C. 1962(c) may turn on whether it commits racketeering crimes through its own employees or in combination with others is a natural consequence of the judgment, which has long been reflected in the law of conspiracy and

which informs the application of RICO, that *collaborative* criminal endeavors pose distinct threats to the public welfare.

ARGUMENT

I. THE RICO TERM "ENTERPRISE" ENCOMPASSES AN ASSOCIATION IN FACT THAT INCLUDES A CORPORATION AS A CONSTITUENT MEMBER

RICO's definitional section states that, as used in the statute, the term "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). Section 1961(4) thus describes two "type[s] of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not." *United States* v. *Turkette*, 452 U.S. 576, 582 (1981). The latter type of enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," and its existence "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 583.

Petitioner contends (Br. 12-26) that, because a corporation is not an "individual" within the meaning of Section 1961(4), an association in fact of which a corporation is a constituent member cannot be a RICO "enterprise." Although petitioner's premise is correct, its suggested conclusion does not follow. Section 1961(4), which is introduced by the word "includes," neither provides an exhaustive roster of the "enterprise[s]" covered by RICO nor excludes a de facto alliance that would constitute an "enterprise" under the usual understanding of that term. Petitioner's proposed categorical rule that a corporation cannot be a constituent part of an associated-in-fact RICO enterprise is thus unsupported by the statutory text, and it would hinder the effective implementation of the law in both the criminal and civil contexts.

A. Section 1961(4) Of Title 18 Contains An Illustrative, Rather Than Exclusive, List Of RICO "Enterprises"

1. Section 1961(4) of Title 18 states that the term "enterprise" "includes" the various entities enumerated in that provision. 18 U.S.C. 1961(4). "In [definitional] provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933); see *Webster's Third New International Dictionary* 1143 (1993) (defining "include" to mean, *inter alia*, "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate"). When 18 U.S.C. 1961 (2000 & Supp. II 2002) is read as a whole, it is clear that the verb "includes" in Section 1961(4) should be interpreted in that manner, and that the list that follows should be treated as illustrative rather than exclusive.

As petitioner explains (Br. 16-17 & n.7), "the term 'includes' may sometimes be taken as synonymous with 'means,'" and thus as introducing a comprehensive list. *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 (1934). Read as a whole, however, the definitional section of RICO (18 U.S.C. 1961 (2000 & Supp. II 2002)) makes clear that Congress did not intend for the word "includes" to have that effect in 18 U.S.C. 1961(4). That definitional section contains four subsections that use the word "includes" (18 U.S.C. 1961(3), (4), (9), and (10)), and five that use the word "means" (18 U.S.C. 1961(1), (2), (6), (7), and (8)). In interpreting similarly structured provisions, in which some definitions are introduced by "means" and others by "includes," this Court has consistently declined to treat the two words as synonymous, and has construed the word "includes" to introduce an illustrative rather than an exclusive list. As the Court explained in *Helvering*, "[t]he natural distinction would be that where 'means' is employed,

the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." 293 U.S. at 125 n.1; accord *Marotta*, 287 U.S. at 517 ("When the section as a whole is regarded, it is evident that these verbs are not used synonymously or loosely but with discrimination and a purpose to give each a meaning not attributable to the other."); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 & n.15 (1977) (holding that the definition of "property" contained in former Federal Rule of Criminal Procedure 41(h) "does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41," and explaining that, "[w]here the definition of a term in Rule 41(h) was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"); cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941) ("To attribute * * * a [limiting] function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application."); U.S. Amicus Br. at 12-13, *S.D. Warren Co.* v. *Maine Bd. of Envtl. Protection*, No. 04-1527 (argued Feb. 21, 2006).[1]

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[1] Noting that 18 U.S.C. 1964(a) uses the phrase "including, but not limited to," petitioner contends (Br. 17) that Congress's failure to employ similar language in Section 1961(4) reflects an intent that the list of covered "enterprise[s]" be treated as exclusive. Congress cannot be faulted for taking a belt-and-suspenders approach in Section 1964(a), especially in light of this Court's willingness to consider equating "includes" with "means" when only the former appears in a statutory section. Unlike Section 1961, Section 1964 does not contain other subsections introduced by the word "means" (and it is not a definitional provision at all). Although Congress might have introduced 18 U.S.C. 1961(3), (4), (9), and (10) with the phrase "includes, but is not limited to," Congress's use of a statutory structure with a settled legal meaning (see pp. 7-8, *supra*) rendered the additional language unnecessary. By using the verb "means" to introduce some of RICO's definitions and "includes" to introduce

The definition of "pattern of racketeering activity" contained in 18 U.S.C. 1961(5), and this Court's construction of that provision, reinforce the conclusion that the verb "includes" in Section 1961(4) should not be treated as synonymous with "means." Section 1961(5) states that the term "'pattern of racketeering activity' *requires* at least two acts of racketeering activity." 18 U.S.C. 1961(5) (emphasis added). This Court has attached significance to Congress's choice of verbs, explaining that "the definition of a 'pattern of racketeering activity' differs from the other provisions in § 1961 in that it states that a pattern '*requires* at least two acts of racketeering activity,' not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (citation omitted). The Court has focused on the verb "requires" to give the phrase "pattern of racketeering activity" a narrower construction than would have been warranted if Section 1961(5) were introduced by the word "means." See *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 237-243 (1989). Congress's use in Section 1961(4) of the introductory verb "includes" should likewise be viewed as denoting *broader* coverage than would the word "means."

2. Petitioner contends that Congress's express reference in Section 1961(4) to "group[s] of individuals associated in fact" suggests an intent not to cover associations in fact composed in part of artificial legal entities such as corporations. See Pet. Br. 14-15 (citing, *inter alia*, *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 81 (2002)).[2] But while the maxim

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others, Congress clearly expressed its intent that the latter definitions should be treated as non-exclusive.

[2] Petitioner also contends (Br. 20-26) that construing Section 1961(4) to exclude associations in fact composed in part of corporations would be consistent with Congress's intent to combat organized crime. Section 1961(4)'s express inclusion of associated-in-fact enterprises may reflect Congress's effort

expressio unius est exclusio alterius is often a useful aid to statutory construction, it is not properly applied where, as here, Congress has used the verb "includes" to introduce a non-exhaustive list of examples. By introducing Section 1961(4) with the word "includes," within a provision in which other definitions are introduced by the word "means," Congress signaled that the omission of particular types of enterprises from the list that follows should *not* be read to imply a deliberate exclusion. Compare *Echazabal*, 536 U.S. at 80 (explaining that "the expansive phrasing of 'may include' points directly away from the sort of exclusive specification" that the *expressio unius* maxim might otherwise suggest).

The legislative history confirms that understanding. Both the Senate and House Reports accompanying RICO stated that the term "enterprise" was defined "to include associations in fact, as well as legally recognized associative entities. Thus, infiltration of *any associative group* by any individual or group capable of holding a property interest can be reached." S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (emphasis added); see H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56 (1970) (using identical language). The Committees'

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to ensure that organized-crime syndicates are treated as covered "enterprises." This Court has recognized, however, that, while "[o]rganized crime was without a doubt Congress' major target" in enacting RICO, *H.J. Inc.*, 492 U.S. at 245, the statute's coverage is not limited to conduct with an organized-crime nexus. Rather, "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime," *id.* at 248. And even insofar as RICO was intended to combat organized crime, Congress drafted the statute with an awareness that "persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises," *ibid.*, and with an intent to prevent sophisticated criminals from exploiting loopholes in the statute's coverage, see, *e.g.*, *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980). Petitioner's construction of the term "enterprise" would disserve that intent.

description of the statutory definition as encompassing "any associative group" substantially undermines petitioner's contention (Br. 14-15) that Congress used the phrase "union or group of individuals associated in fact" (18 U.S.C. 1961(4)) specifically to exclude such associations. Cf. *Turkette*, 452 U.S. at 580 ("There is no restriction upon the associations embraced by the definition [of 'enterprise'].").

In *New York Telephone*, this Court rejected a proposed inference very similar to the one advocated by petitioner here. The Court in *New York Telephone* construed former Federal Rule of Criminal Procedure 41(h), which provided that "[t]he term 'property' is used in this rule to include documents, books, papers and any other tangible objects." 18 U.S.C. App. at 1465 (1976); see *New York Tel.*, 434 U.S. at 169. Relying in particular on the fact that other definitions in Rule 41(h) were "introduced by the phrase 'to mean'" (*id.* at 169 n.15), this Court stated that, "[a]lthough Rule 41(h) defines property 'to include documents, books, papers and any other tangible objects,' it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41." *Id* at 169. Notwithstanding Rule 41(h)'s express reference to "tangible objects," this Court concluded that "Rule 41 is sufficiently broad to include seizures of intangible items such as dial impulses recorded by pen registers as well as tangible items." *Id.* at 170. Similarly here, in the context of 18 U.S.C. 1961 taken as a whole, Section 1961(4)'s reference to "group[s] of individuals associated in fact" does not preclude the possibility that other associative groups could qualify as RICO "enterprises."[3]

[3] Petitioner did not argue in the court of appeals that a corporation can never be a constituent member of an associated-in-fact RICO enterprise, and the Eleventh Circuit accordingly did not discuss the interpretive issues raised by Part I of petitioner's brief in this Court. Every court of appeals to address the question, however, has agreed that a de facto alliance of which a corpora-

B. Petitioner's Construction Of The RICO Term "Enterprise" Is Inconsistent With The Usual Understanding Of That Term And Would Hinder The Effective Implementation Of The Statute

1. Congress's use of the word "includes" to introduce 18 U.S.C. 1961(4) does not give courts unfettered discretion to decide whether a de facto alliance between a corporation and other actors should be treated as a RICO "enterprise." Cf. Pet. Br. 16 (citing *Willheim* v. *Murchison*, 342 F.2d 33, 42 (2d Cir.), cert. denied, 382 U.S. 840 (1965)). Rather, it simply means that, *if* the term "enterprise" would otherwise be understood to encompass such an alliance, it should be treated as covered, notwithstanding its omission from the list of illustrative examples contained in Section 1961(4).

At the time of RICO's enactment in 1970, the term "enterprise" would naturally have been understood to encompass not only discrete legal entities, but also de facto alliances formed for the purpose of achieving a common objective. This Court's opinions in the years preceding RICO's enactment

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tion or similar artificial legal entity is a part may constitute an "enterprise" within the meaning of RICO. See, *e.g.*, *United States* v. *Najjar*, 300 F.3d 466, 484-485 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *London*, 66 F.3d 1227, 1244 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996); *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *United States* v. *Masters*, 924 F.2d 1362, 1366 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991); *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *United States* v. *Perholtz*, 842 F.2d 343, 352-353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *United States* v. *Aimone*, 715 F.2d 822, 828 (3d Cir. 1983), cert. denied, 468 U.S. 1217 (1984); *United States* v. *Thevis*, 665 F.2d 616, 625-626 (5th Cir.), cert. denied, 456 U.S. 1008, 458 U.S. 1109, and 459 U.S. 825 (1982); *Huber*, 603 F.2d at 393-394. Although Congress on numerous occasions has amended other definitional provisions contained within 18 U.S.C. 1961, it has not acted to narrow the coverage of Section 1961(4), despite the monolith of precedent dating back over 20 years.

used the term in that manner.[4] In addition, the Travel Act, which was enacted in 1961 and prohibited interstate travel or the use of interstate commercial facilities in connection with "any business enterprise involving" specified crimes (18 U.S.C. 1952(b) (1964)), had repeatedly been applied to collaborative criminal endeavors that did not involve the creation of any distinct legal entity. See, *e.g.*, *United States* v. *Brennan*, 394 F.2d 151, 153 (2d Cir.), cert. denied, 393 U.S. 839 (1968); *United States* v. *Zizzo*, 338 F.2d 577, 580 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965). Indeed, petitioner does not contend that such de facto alliances fall outside the usual understanding of the word "enterprise."

Once that general principle has been established, neither common English usage nor background legal principles suggest that the term "enterprise" should be understood to exclude alliances composed in whole or in part of corporations. "After all, incorporation's basic purpose is to create a distinct legal entity," *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001), that is treated at law as a "person." A corporation is generally capable of entering into contractual agreements on the same terms as natural persons, and the rights and obligations established by such contracts are those of the corporation alone. See, *e.g.*, *Domino's Pizza, Inc.* v. *McDonald*, 126 S. Ct. 1246, 1250 (2006) ("[I]t is fundamental corporation and agency law * * * that the shareholder and

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[4] See, *e.g.*, *Radio & Television Broad. Technicians Local Union 1264* v. *Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (explaining that the National Labor Relations Board "considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise"); see also *Namet* v. *United States*, 373 U.S. 179, 183 (1963) (explaining, with regard to an illegal gambling operation, that the defendant "was acting as banker for the enterprise"); *Callanan* v. *United States*, 364 U.S. 587, 594 (1961) ("[T]he danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.").

contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts."). A corporation is also deemed capable of joining a conspiracy and is subject to potential civil and criminal liability therefor. See 10 *Fletcher Cyclopedia of the Law of Private Corporations* §§ 4884, 4951.50, at 330-331, 668-669 (2001 rev. ed.). There is no sound reason to treat corporations as incapable of entering into the sort of de facto alliance that would constitute a RICO "enterprise" if it were formed solely by natural persons. The Seventh Circuit has explained:

> The statute says "'enterprise' includes"—not "'enterprise' means." The point of the definition is to make clear that it need not be a formal enterprise; "associated in fact" will do. Surely if three individuals can constitute a RICO enterprise, as no one doubts, then the larger association that consists of them plus entities that they control can be a RICO enterprise too. Otherwise while three criminal gangs would each be a RICO enterprise, a loose-knit merger of the three, in which each retained its separate identity, would not be, because it would not be an association of individuals. That would make no sense.

United States v. *Masters*, 924 F.2d 1362, 1366 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991).

2. Petitioner's reliance (Br. 19-20) on the rule of lenity is misplaced. The rule of lenity is not a restriction on congressional power, but a canon of statutory construction. See, *e.g.*, *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) (characterizing the rule of lenity as "a time-honored interpretive guideline when the congressional purpose is unclear"); *Busic* v. *United States*, 446 U.S. 398, 407 (1980). The rule "is not to be applied where to do so would conflict with the implied or expressed intent of Congress." *Liparota*, 471 U.S. at 427.

Here, application of the rule of lenity would contravene Congress's intent. RICO expressly provides that the statute should be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947; see *Sedima*, 473 U.S. at 497-498 (inferring principle that "RICO is to be read broadly" both from "Congress' self-consciously expansive language and overall approach" and from the statute's liberal-construction clause). The presumption that statutes having criminal applications should be construed narrowly cannot be controlling where, as here, Congress has directed courts to employ a different interpretive methodology.[5]

In any event, the rule of lenity "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (citations, brackets, and internal quotation marks omitted). In light of the structure of 18 U.S.C. 1961 as a whole and this Court's decisions construing comparable definitional provisions (see pp. 7-8, *supra*), no "grievous ambiguity" exists as to whether a de facto alliance of corporations can constitute a RICO "enterprise." Far from establishing such ambiguity, petitioner merely seeks to avoid the natural reach of the term "enterprise."[6]

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[5] Contrary to petitioner's assertion (Br. 19), the Court in *Sedima* did not hold that "18 U.S.C. §§ 1961 and 1962 should be strictly construed under the rule of lenity." *Sedima* involved the construction of 18 U.S.C. 1964(c) and presented no issue concerning the scope of coverage of either Section 1961 or Section 1962; the Court simply held that Section 1964(c) should be interpreted broadly to effectuate RICO's purposes *even assuming* that strict construction of Sections 1961 and 1962 would be appropriate. See 473 U.S. at 491-492 n.10.

[6] The rule of lenity serves in part to "ensure[] that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. Construing the RICO term "enterprise" to encompass the association in fact alleged here does not subject petitioner to any unfair surprise,

3. The United States frequently brings criminal or civil enforcement actions alleging that the defendants have violated 18 U.S.C. 1962(c) by conducting or participating in the conduct of the affairs of an associated-in-fact RICO "enterprise" that consists in part of a corporation or other artificial legal entity. The categorical rule advocated by petitioner, under which the only associations in fact that could be treated as RICO "enterprises" would be those composed exclusively of individuals, would significantly impair the government's ability to enforce the statute's substantive provisions and to obtain effective remedies.[7]

a. Criminal and civil RICO defendants often conduct both racketeering and other activities through multiple legal entities. See, *e.g.*, *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1273 (11th Cir.), cert. denied, 531 U.S. 1015 (2000); *United States* v. *Feldman*, 853 F.2d 648, 651-656 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989). In some instances, the defendant's control over multiple legal entities that are

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particularly in light of the substantial and unbroken body of precedent in the courts of appeals including the Eleventh Circuit (see note 3, *supra*) holding that a corporation or similar entity may be a member of an associated-in-fact RICO "enterprise." Cf. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (noting that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute"). Petitioner can scarcely claim to have relied on its current narrower construction of Section 1961(4), since petitioner did not urge that construction until its brief on the merits in this Court.

[7] Although it is possible for a corporation to violate 18 U.S.C. 1962(c) by participating in the conduct of the affairs of a separate legal entity, see *H.J. Inc.*, 492 U.S. at 233-234 (plaintiffs alleged, *inter alia*, that a telephone company had participated in the conduct of the affairs of a public utility commission by bribing the commission's members), the vast majority of criminal and civil cases filed by the United States in which corporations have been named as defendants have alleged the existence of a larger associated-in-fact enterprise. As a practical matter, acceptance of petitioner's proposed construction of Section 1961(4) would render corporations largely immune from liability under Section 1962(c).

nominally distinct from each other may be essential to the achievement of his criminal goals.[8] In such cases, treatment of the corporations or similar entities as components of a single RICO "enterprise" reflects the essential character of the defendant's unlawful scheme.

b. In order to establish a violation of 18 U.S.C. 1962(c), the government must prove that the defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Although a "'pattern of racketeering activity' requires at least two acts of racketeering," 18 U.S.C. 1961(5), two such acts are not always sufficient to establish the requisite "pattern," see *H.J. Inc.*, 492 U.S. at 237-238; p. 9, *supra*. "To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." 492 U.S. at 240; see *id.* at 242 ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.").

When a defendant perpetrates criminal conduct through the coordinated activities of nominally distinct corporations,

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[8] See, *e.g.*, *Securitron Magnalock Corp.* v. *Schnabolk*, 65 F.3d 256, 263-264 (2d Cir. 1995) (defendant used his control of a security firm and a magnetic-lock manufacturer to defame a competing lock manufacturer; the fraud drew strength from, *inter alia*, the seemingly diverse sources of the defamatory statements), cert. denied, 516 U.S. 1114 (1996); *Feldman*, 853 F.2d at 656 (where defendant controlled seven corporations, "it was [the corporations'] very separate existence that made [defendant's] activities possible and profitable" by allowing him to hide fraudulently obtained insurance proceeds from creditors); *United States* v. *Perkins*, 596 F. Supp. 528, 529 (E.D. Pa.) (to facilitate bid-rigging scheme, defendant "set up six corporations to appear to be separate and independent vendors bidding competitively for defense contracts"), aff'd, 749 F.2d 29 (3d Cir. 1984) (Table), cert. denied, 471 U.S. 1015 (1985).

it may be difficult for the government to prove the requisite "pattern of racketeering activity" with respect to any *single* corporation, even though such a pattern is evident when the activities of all such corporations are viewed together.[9] Under petitioner's theory, however, the government would be precluded from relying upon the cumulative activities of different corporations (or similar artificial entities) to demonstrate that the defendant conducted the affairs of an "enterprise" through a "pattern of racketeering activity." That rule "would perversely insulate the most sophisticated racketeering combinations from RICO's sanctions, the precise opposite of Congress' intentions." *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980).

c. Even when acceptance of petitioner's legal theory would not altogether preclude a RICO criminal or civil action from going forward, it might hinder the effective implementation of the statute's remedial provisions. Petitioner contends (Br. 41) that its interpretive approach will not "impair RICO's usefulness as a tool to attack corporate wrongdoing" because "the officers and managers who direct a corporation to engage in racketeering activity [] will always be appropriate § 1962(c) defendants when they conduct the affairs of that corporation through a pattern of racketeering activity." A prosecution of

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[9] See, *e.g.*, *United States* v. *Butler*, 954 F.2d 114, 129 (2d Cir. 1992) (defendant claimed that the enterprise consisted of a single legal entity and the proof showed one predicate act committed in relation to that entity, but court found that the RICO enterprise consisted of four legal entities and that defendant had committed multiple predicate acts in the conduct of that larger enterprise); cf. *United States* v. *Stolfi*, 889 F.2d 378, 379-380 n.1 (2d Cir. 1989) (where defendants contested government's allegation that a union and a welfare fund together constituted a single RICO "enterprise," defendants sought jury instruction stating in part that, if the jury found that the union and the fund were distinct enterprises, it must "find that as to *each enterprise* the defendant you are considering committed two acts of racketeering related by some common plan, scheme or motive").

the blameworthy corporate officers, however, would not enable the government to obtain forfeiture of the corporation's own assets, including profits the corporation may have realized as a direct result of its racketeering. See 18 U.S.C. 1963(a); *Russello* v. *United States*, 464 U.S. 16, 20-29 (1983) (profits and proceeds derived from racketeering in violation of 18 U.S.C. 1962(c) are forfeitable under Section 1963(a)). Because "the Government is entitled to seek forfeiture of only *the defendant's* interest in property that was derived from, or was used to commit, the criminal offense," *United States* v. *BCCI Holdings, Luxembourg, S.A.*, 69 F. Supp. 2d 36, 51 (D.D.C. 1999) (emphasis added), the United States can obtain RICO forfeitures of *corporate* assets only by bringing a prosecution against the corporation itself. And because liability under 18 U.S.C. 1962(c) requires proof "of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name," *Cedric Kushner*, 533 U.S. at 161, the government's ability to prosecute the corporation will often depend upon its ability to allege and prove the existence of a larger RICO enterprise.

The prohibitions of 18 U.S.C. 1962(c) apply to "any person," with the term "person" defined to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. 1961(3). That definition clearly encompasses a corporation, and the text of Section 1962(c) provides no basis for exempting corporations from RICO liability in situations where natural persons would be covered. Cf. *H.J. Inc.*, 492 U.S. at 249 ("Legitimate businesses 'enjoy neither an inherent capacity for criminal activity nor immunity from its consequences.'") (quoting *Sedima*, 473 U.S. at 499). As this Court's decision in *Cedric Kushner* makes clear, a corporation (like a natural person) that *unilaterally* commits RICO predicate acts cannot be held liable under Section 1962(c) on the theory that it conducted its *own* affairs through

a pattern of racketeering activity. See 533 U.S. at 162-163. In that circumstance, the individual corporate officers who oversaw the unlawful conduct may be the only available RICO defendants. But when a corporation enters into a de facto alliance that would constitute a Section 1961(4) association in fact if it were formed by individuals, a rule that would insulate the corporation from RICO liability is unsupported by RICO's text, and it would disserve the statute's purposes.

Acceptance of petitioner's position would also substantially impair the government's ability to obtain effective relief in cases involving the corruption of labor unions. The civil RICO remedies available to the United States under 18 U.S.C. 1964 were intended in significant part to address the corrupt control and influence of organized crime over labor unions and related legal entities. See, *e.g.*, S. Rep. No. 617, *supra*, at 77-83; H.R. Rep. No. 1574, 90th Cong., 2d Sess. 5-9 (1968). To address that problem, the United States has brought numerous civil RICO lawsuits, which typically allege the existence of an associated-in-fact RICO enterprise consisting of a labor union, related benefit plans, other related legal entities, and corrupt union officials and organized crime figures. In such cases, the United States has obtained injunctive relief against the union-defendants, including appointment of court officers to monitor union operations and to enforce union election-reform and ethical-practices requirements on an ongoing basis. Under petitioner's construction of 18 U.S.C. 1961(4), however, the government would be precluded from naming as a defendant (and obtaining equitable relief against) the union itself. Although the government could proceed against corrupt individuals under Section 1962(c) (since the union would constitute a RICO "enterprise"), the relief available against individual defendants would not adequately address *systemic* problems of union corruption.

II. RESPONDENTS' COMPLAINT ADEQUATELY ALLEGED A VIOLATION OF 18 U.S.C. 1962(c)

Petitioner contends that, if the allegations of respondents' complaint are deemed sufficient to state a claim under 18 U.S.C. 1962(c), every contract between a corporation and persons outside the corporate structure will result in the formation of a RICO associated-in-fact "enterprise." See, *e.g.*, Pet. Br. 40 (asserting that the Eleventh Circuit's approach "recognizes an 'enterprise' whenever a corporation contracts with another entity"). That argument is misconceived. The government or a private plaintiff obviously cannot establish the existence of a RICO "enterprise" simply by proving a contractual agreement between legally distinct actors. Other well-established legal principles prevent such an overbroad application of RICO by defining the characteristics—chiefly, a shared purpose among the members and a continuing organizational presence—that an associated-in-fact enterprise must be shown to possess. Petitioner's proposed categorical rule, to the effect that business entities engaged in "arms-length dealings" (Br. i) can *never* combine to form a RICO associated-in-fact enterprise, is both unnecessary and unsound.

A. Respondents' Complaint Adequately Alleged That Petitioner Has Participated In The Operation Of A RICO Enterprise

This Court in *Turkette* described the basic attributes of a RICO associated-in-fact enterprise. The Court explained that such an enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," and that its existence "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." 452 U.S. at 583; see, *e.g.*, *United States* v. *Rogers*, 89 F.3d 1326, 1335-1338

(7th Cir.), cert. denied, 519 U.S. 999 (1996); *United States* v. *Blinder*, 10 F.3d 1468, 1473-1475 (9th Cir. 1993); *United States* v. *Church*, 955 F.2d 688, 697-699 (11th Cir.), cert. denied, 506 U.S. 881 (1992). The instant case comes to this Court on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and it is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Respondents' complaint adequately alleged that an enterprise having the characteristics set forth in *Turkette* existed, and that petitioner participated in the conduct of the enterprise's affairs.

1. Respondents alleged that "[t]he recruiters and [petitioner] share the common purpose of obtaining illegal workers for employment by [petitioner]." J.A. 23. Proof of that allegation at trial would satisfy the "common purpose" requirement articulated in *Turkette*. In *Baker* v. *IBP, Inc.*, 357 F.3d 685, 691, cert. denied, 543 U.S. 956 (2004), the Seventh Circuit found similar allegations to be inadequate to establish the requisite "common purpose," based in part on the fact that "the recruiters want to be paid more for services rendered" while the employer "would like to pay them less." That holding is erroneous because, as the court of appeals in this case recognized, there is no "requirement that the 'common purpose' of the enterprise be the sole purpose of each and every member of the enterprise." Pet. App. 10a.

Indeed, in few if any associated-in-fact enterprises is there *complete* unity of purpose among the group's members. In the paradigmatic criminal syndicate, some members may receive specified sums for particular acts, while others may receive an agreed-upon percentage of the proceeds; and it can safely be assumed that each member of the enterprise will be principally conc rned with maximizing his own "take." Cf. *Russello*, 464

U.S. at 19-20 (describing associated-in-fact enterprise in which the owner of a commercial building paid a flat fee to an arsonist and collected insurance proceeds after the building was destroyed). When two individuals enter into a continuing arrangement in which the first sells wholesale quantities of narcotics to the second, who then resells to users, the desire of the first individual to maximize the wholesale price and of the second individual to minimize it does not prevent the formation of an associated-in-fact enterprise. Rather, the shared objective of facilitating narcotics trafficking satisfies the "common purpose" requirement. The same principle applies here.[10]

2. Respondents also adequately alleged the existence of an "ongoing organization" whose "various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. Respondents alleged that petitioner had "engaged in an open and ongoing pattern of" immigration-law violations during a five-year period, assisted by recruiters who "work closely with [petitioner] to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular [petitioner]

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[10] Conspiracy law draws a similar distinction between mere buyer-seller arrangements, which do not form a conspiracy, and joint ventures in which both parties have an interest in the overall success of the endeavor, which do. Compare, *e.g.*, *United States* v. *Suggs*, 374 F.3d 508, 518-519 (7th Cir. 2004) (itemizing factors bearing on whether a "buyer-seller relationship developed into a cooperative venture" and finding evidence sufficient to support the inference that a "consistent, long term distribution conspiracy" existed), cert. denied, 543 U.S. 1079 (2005), with *United States* v. *Rivera*, 273 F.3d 751, 755 (7th Cir. 2001) (finding insufficient evidence "to infer the evolution from a mere buyer-seller arrangement to conspiracy"). Relevant factors in a drug-distribution case include "whether there was prolonged cooperation between the parties, a level of mutual trust, standardized dealings, sales on credit (or 'fronting'), and the quantity of drugs involved," which may demonstrate the requisite "shared stake in the illegal venture." *Suggs*, 374 F.3d at 518. Analogous factors apply in the present context. Cf. *Salinas* v. *United States*, 522 U.S. 52, 65 (1997) (noting that conspiracy and enterprise may be "coincident in their factual circumstances").

facility on short notice as the need arises." J.A. 23. The complaint further alleged that some recruiters "have relatively formal relationships with [petitioner] in which they employ illegal workers and then loan or otherwise provide them to [petitioner] for a fee," and that such "recruiters are sometimes assisted by [petitioner's] employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity." *Ibid.* Respondents thus alleged that a de facto alliance between petitioner and the recruiters, in which each member of the enterprise performed a defined function, had operated continuously during an extended period of time to provide petitioner a steady stream of unlawful workers.

3. To prevail in this case, respondents must ultimately demonstrate that petitioner "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Respondents' generalized averment that petitioner "participates in the operation and management of the affairs of the enterprise" (J.A. 23) would likely have been sufficient to survive a motion to dismiss. See Fed. R. Civ. P. 8(a)(2) (complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); cf. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974) (so long as a criminal defendant is fairly apprised of the charge against him, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself"). Any doubt on that point is eliminated by respondents' more specific allegations that the recruiters "work closely with [petitioner] to meet its employment needs by offering a pool of illegal workers" and "are sometimes assisted by [petitioner's] employees who carry a supply of social security cards." J.A. 23.

B. No Exception To RICO's Prohibitions Exists For "Arms-Length Dealings" Between Distinct Business Entities

Petitioner frames the question presented (Br. i) as whether business entities "engaged in ordinary, arms-length dealings can constitute an 'enterprise' under [RICO]." Petitioner contends (Br. 27) that the Eleventh Circuit's approach "improperly allows plaintiffs to pursue [RICO] claims against a corporation by alleging that the corporation entered into routine business relationships to perform the activities of the corporation." Contrary to petitioner's contention, nothing in RICO precludes a finding that commercial actors engaged in an "arms-length business arrangement" (Br. 35) have formed an associated-in-fact "enterprise."

1. As explained above (see pp. 21-24, *supra*), the principles announced by this Court in *Turkette*, and subsequently applied in numerous court of appeals decisions, place meaningful limits on the ability of the government and private plaintiffs to allege and prove the existence of an associated-in-fact RICO enterprise. In particular, the requirements that the members of an associated-in-fact enterprise share a "common purpose" (*Turkette*, 452 U.S. at 583), and that "the various associates function as a continuing unit" (*ibid.*), ensure that business entities will not be deemed to have formed a RICO enterprise simply by entering into private contracts. Contrary to petitioner's suggestion (Br. 40), the adequacy of respondents' complaint therefore does not depend on the proposition that a RICO "enterprise" exists "whenever a corporation contracts with another entity."

2. Petitioner describes this case as involving "routine business relationships" (Br. 27) and observes (Br. 38) that "[h]iring employees is a core corporate function." The specific conduct alleged in respondents' complaint, however—*i.e.*, petitioner's alleged knowing and systematic violations of federal

immigration law during an extended period of time through an alliance with outside recruiters—cannot plausibly be characterized as a "routine" business practice. Petitioner is not immunized from RICO liability simply because its alleged racketeering activities fall within a more general category of corporate practices that are essential to the operation of a business.

By way of analogy, suppose that a seemingly legitimate pharmaceutical company diverted a portion of its manufacturing capacity to the illicit production of methamphetamine. If the company entered into an ongoing arrangement with another entity, which agreed to furnish the raw materials for methamphetamine production on a continuing basis in order to facilitate the company's unlawful practices, the government could properly charge the pharmaceutical company under 18 U.S.C. 1962(c), on the theory that the two entities were constituent members of a RICO associated-in-fact enterprise. The defendant in those circumstances could not avoid prosecution by arguing that the manufacture of drugs is a "core corporate function" of a pharmaceutical company, and that the government therefore had alleged nothing more than unlawful conduct of the company's "own business" (Pet. Br. 38).[11]

With respect to the adequacy of respondents' complaint, moreover, it is crucial that the outside recruiters are alleged to have been *knowing* participants in petitioner's scheme to

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[11] When the government alleges the existence of an associated-in-fact enterprise engaged in narcotics distribution, and identifies a street-level dealer as one member of the enterprise, the person *most likely* to be a fellow member would be a wholesaler who sold the dealer drugs. That does not mean that every wholesale transaction in illicit narcotics entails the formation of a RICO enterprise: the government must prove the existence of an "ongoing organization" in which "the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. But there is no basis for a categorical rule that a narcotics retailer and his wholesaler can *never* be fellow members of an associated-in-fact enterprise, simply because the interaction between the two involves "arms-length" business dealings.

locate and employ illegal aliens. See J.A. 23. A quite different situation would be presented if an employment agency regularly located and referred *legal* workers to a business corporation, which then utilized the workers in the performance of racketeering acts. If the employment agency was unaware of the corporation's unlawful conduct, the two entities would lack the requisite "common purpose" and therefore could not be regarded as constituent members of an associated-in-fact enterprise, even if the agency's referrals were essential as a practical matter to the corporation's illicit endeavors. The "common purpose" requirement thus helps to ensure that a corporation is not held liable under 18 U.S.C. 1962(c) for what is in substance unilateral misconduct.

3. Petitioner contends (Br. 30-32) that, because the courts of appeals have consistently refused to treat a corporation together with its officers and employees as an associated-in-fact enterprise, this Court should hold that such an enterprise cannot consist of a business corporation and its contracting partner. That is a non sequitur. Because the recruiters who are alleged to have assisted in petitioner's unlawful practices stand in a fundamentally different relation to the corporation than do petitioner's employees, treatment of petitioner and the outside recruiters as members of an associated-in-fact enterprise is (if respondents' allegations are taken as true) fully consistent with the text and purposes of RICO.

a. Because 18 U.S.C. 1962(c) "require[s] some distinctness between the RICO defendant and the RICO enterprise," a RICO defendant (whether a natural person or an artificial entity) cannot be held liable under Section 1962(c) based solely on proof that it conducted its *own* affairs through a pattern of racketeering activity. *Cedric Kushner*, 533 U.S. at 162. The necessary distinctness exists where, as here, the Section 1962(c) defendant is one member of an alleged associated-in-fact enterprise. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d

343, 353-354 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); *Haroco, Inc.* v. *American Nat'l Bank & Trust Co.*, 747 F.2d 384, 401 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985). Proof that an alleged association in fact is an "ongoing organization" whose members join to "function as a continuing unit," *Turkette*, 452 U.S. at 583, by its nature implies that the group should be regarded for purposes of RICO as an entity distinct from any single member. In virtually every case in which the United States alleges the existence of a RICO association in fact, the defendant is alleged to be a member of that enterprise. See, *e.g.*, *Russello*, 464 U.S. at 19; *Turkette*, 452 U.S. at 578-579. And Congress's determination that an association in fact should be treated as a RICO "enterprise" would be largely negated if the persons who form such an association were immune from liability for the illicit conduct of its affairs.

b. As petitioner observes (Br. 30-31), the courts of appeals have agreed that a corporation cannot be held liable under 18 U.S.C. 1962(c) for conducting the affairs of a purported association in fact consisting of the corporation and its own employees. See, *e.g.*, *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (*Riverwoods*). Contrary to petitioner's suggestion (Br. 39), however, that rule does not rest on the mere fact that a corporation contracts with its employees for the performance of tasks that benefit the corporation. Rather, because an employee is *part of* the corporation, the two are not naturally characterized as forming a combination that can meaningfully be distinguished from the corporation itself. The recruiters who are alleged to have assisted petitioner in its unlawful employment practices, by contrast, have no place within petitioner's corporate structure. Indeed, petitioner repeatedly characterizes the dealings between itself and the recruiters as being conducted at "arms-length" (*e.g.*, Pet. Br. i). The rationale for the rule announced in *Riverwoods* and like cases is therefore inapplicable here.

As the government's brief in *Cedric Kushner* explained, the *Riverwoods* holding also serves to prevent circumvention through artful pleading of 18 U.S.C. 1962(c)'s requirement that the alleged violator must be distinct from the RICO enterprise. See U.S. Amicus Br. at 16, *Cedric Kushner* (No. 00-549). A corporation together with its employees will necessarily satisfy the requirements set forth in *Turkette*—*i.e.*, that the government or private plaintiff prove the existence of an "ongoing organization" whose members share a "common purpose" and "function as a continuing unit." 452 U.S. at 583. Thus, if a corporation and its personnel could be treated as fellow members of an associated-in-fact enterprise, "the prohibition on naming the same corporation as both the defendant and the RICO enterprise could be routinely evaded by listing corporate officers and employees as part of the enterprise, without affecting the gravamen of the complaint." U.S. Amicus Br. at 16, *Cedric Kushner* (No. 00-549). No comparable danger of circumvention exists here, since a corporation and outside entities may be treated as constituent members of an associated-in-fact enterprise only if the plaintiff alleges and proves that the group members were not merely contractually linked, but also shared a "common purpose" and "function[ed] as a continuing unit." *Turkette*, 452 U.S. at 583.

c. Petitioner suggests (*e.g.*, Br. 35) that it is somehow anomalous to distinguish, for purposes of Section 1962(c)'s coverage, between cases in which a corporation undertakes a pattern of racketeering activity through its own employees, and cases in which it receives the assistance of persons outside the corporate structure. That distinction, however, follows directly from the fact that Section 1962(c) prohibits, not the commission of racketeering crimes per se, but the use of racketeering activity to operate or manage an *enterprise* that is distinct from the violator itself. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 177-185 (1993); *Cedric Kushner*, 533 U.S. at 160-

163.[12] The necessary consequence of that limitation on Section 1962(c)'s coverage is that criminal conduct undertaken in collaboration with others may trigger distinct legal sanctions that do not apply in cases of wholly unilateral wrongdoing. That feature of RICO is scarcely novel: the law of conspiracy has long reflected the judgment that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[12] In Part II of its brief, petitioner purports to "[a]ssum[e] for the sake of argument that an association-in-fact enterprise can sometimes include legal entities such as a corporation." Pet. Br. 27. Petitioner goes on to contend, however, that a corporation cannot enter into an association in fact with its own officers and employees, *or* with affiliated corporate entities, *or* with persons who deal with the corporation at "arms-length." It is not clear who is left. Though framed as a narrower alternative to the categorical position taken in Part I of petitioner's brief, acceptance of petitioner's argument in Part II would as a practical matter establish a per se rule or something very close to it. Similarly, petitioner's contention that a de facto criminal alliance between corporate entities should be treated no differently than unilateral corporate wrongdoing is inconsistent with Congress's evident purpose in applying Section 1962(c) to associated-in-fact enterprises, and with the assumption that such enterprises may include corporations as constituent members.

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Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a corporate defendant and those it enlists to assist it in conducting the corporation's affairs may together constitute an association-in-fact "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961(4), and one that is distinct from the corporate defendant itself, as required under 18 U.S.C. § 1962(c).

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America, the National Federation of Independent Business Legal Foundation, and the Society for Human Resource Management respectfully submit this brief as *amici curiae* in support of petitioner.[1]

INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses, representing an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. One important function of the Chamber is to represent the interests of its members by filing briefs as *amicus curiae* in cases involving issues of national concern to American business, including cases construing the Racketeer Influenced and Corrupt Organizations Act (RICO).

The National Federation of Independent Business Legal Foundation – a nonprofit public interest law firm established to protect the rights of America's small business owners – is the legal arm of the National Federation of Independent Business (NFIB), the nation's oldest and largest organization dedicated to representing

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[1] Letters from petitioner and respondents providing consent to the filing of *amici* briefs in this case have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* hereby state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

the interests of small business owners throughout all 50 states. The 600,000 NFIB members own a wide variety of small businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 200,000 individual members, SHRM's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. As an influential voice, SHRM's mission is also to advance the human resource profession to ensure that human resource management is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

Amici recognize the importance of consistent and disciplined application of RICO to deter and remedy wrongdoing prohibited by the statute. At the same time, they are concerned about those who have strong incentives to misuse the statute against legitimate businesses, in large part because of civil RICO's treble damages provisions.

The court of appeals' holding in this case that plaintiffs adequately pleaded a RICO "enterprise" consisting of the defendant corporation and its alleged agents threatens to expand dramatically RICO liability for corporations that, to remain competitive, must rely more than ever on non-employees to provide certain goods and services. It threatens to convert a statute that was designed to deter organized crime into a tool primarily used to induce settlements from legitimate businesses that cannot risk either the possibility of being subjected to an award of treble damages or the reputational injury of being sued in federal court under a statute associated with racketeers and mobsters. Accordingly, *amici* and their members have a strong interest in the Court correctly

interpreting RICO and reversing the decision below with regard to the federal RICO claims.

SUMMARY OF ARGUMENT

As the name of the act suggests, a person violates the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, when the person criminally influences or corrupts an organization. This case involves the scope of one of the four categories of such activity prohibited by Congress through RICO. Section 1962(c) prohibits a "person" (which includes a corporation) that is "employed by or associated with" a statutorily-defined "enterprise" from conducting, or participating in the conduct of, the affairs of that enterprise through a pattern of racketeering. 18 U.S.C. § 1962(c). For purposes of RICO, "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

The enterprise alleged in this case consists of the defendant corporation and certain recruiters and employment agencies who assisted in carrying out the affairs of the corporation. The court of appeals erroneously held that such allegations of an "enterprise" survive a motion to dismiss because, in the court of appeals' view, any "'loose or informal' association of distinct entities" may form an association-in-fact RICO enterprise, and the court found that it could not say at that stage of the litigation whether the plaintiffs could establish that the defendant corporation conducted or participated in the conduct of the affairs of the alleged enterprise. Pet. App. 7a-9a. That "anything goes" approach to RICO enterprises and Section 1962(c) liability is contrary to the plain statutory text and the purpose of the RICO statute.

First, the association-in-fact enterprise alleged in this case does not satisfy the statutory definition of "enterprise." The combination of a corporation and others carrying out the affairs of the corporation does not, and was not alleged to, constitute a "legal entity" and therefore

cannot meet the first prong of the "enterprise" definition. Nor does it constitute a "group of individuals associated in fact" because a corporation is not an "individual" within the meaning of RICO, and thus it does not meet the second prong of the "enterprise" definition. This Court should reverse the judgment below on this ground and halt the continued trend in the lower courts that ignores the plain statutory text and improperly extends RICO association-in-fact enterprises to cases where a corporation is a constituent of a group. This clear-cut approach would establish a bright-line rule easily applied by lower courts and is most faithful to congressional intent.

Second, even if a corporation could serve as a constituent of an association-in-fact enterprise, plaintiffs did not adequately allege here that the defendant corporation conducted or participated in the conduct of the affairs of an enterprise distinct from the affairs of the corporation itself. This Court should adopt the position taken by a vast majority of the courts of appeals that a defendant corporation and agents acting on its behalf do not constitute an enterprise distinct from the corporation itself. The contrary approach by the court below unfairly penalizes corporations for contracting with others to handle the corporation's affairs and establishes a false distinction between such corporations and those who hire employees to perform the same functions.

ARGUMENT

A CORPORATE DEFENDANT CANNOT BE LIABLE FOR CONDUCTING THE AFFAIRS OF A RICO ASSOCIATION-IN-FACT ENTERPRISE WHEN THE ALLEGEDLY DISTINCT ENTERPRISE CONSISTS OF THE CORPORATION AND THOSE IT ENLISTS TO ASSIST IT IN CONDUCTING THE CORPORATION'S AFFAIRS

A. The Association-in-Fact Prong Of The "Enterprise" Definition In RICO Section 1961(4) Applies Only To Groups Of "Individuals," Which Requires Reversal Of The Judgment Below

This case is but one in a continuing series of lower court decisions that have ignored the limits of the plain text of RICO Section 1961(4)'s definition of an association-in-fact "enterprise." The lower courts have, instead, seized upon a portion of one statement of this Court in *United States v. Turkette*, 452 U.S. 576 (1981), and have taken it out of context to declare summarily that "[t]here is no restriction upon the associations embraced by the definition." *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.) (quoting *Turkette*, 452 U.S. at 580), *cert. denied*, 488 U.S. 821 (1988). Those courts ignore the critical next phrase in the Court's opinion, rooted in the statutory text, that "an enterprise includes any union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580; *see, e.g., United States v. Feldman*, 853 F.2d 648, 655 (9th Cir. 1988). This Court should take this opportunity to curb the lower courts' expansion of the RICO "enterprise" definition and to give effect to Congress's intent that the definition hold the statute within bounds. *See* 18 U.S.C. 1961(4); Arthur F. Mathews *et al.*, *Report of the Ad Hoc Civil RICO Task Force*, American Bar Ass'n Section of Corp. Banking & Bus. L., at 104 (1985) (ABA Report).

1. An association-in-fact enterprise is limited to a group of "individuals," and a corporation is not an individual within the meaning of the statute

The starting place in construing the statute is, of course, the language of the statute itself. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

Congress expressly stated that, as used in RICO, "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This Court has explained that this definition includes "two categories of associations." *Turkette*, 452 U.S. at 581. Those in the first category are associations under law, *i.e.* "legal entit[ies]." Under this first prong of the definition, a corporation, as a legal entity, can constitute a RICO "enterprise" where it is alleged that the corporation's affairs are being conducted by the defendant through a pattern of racketeering. In such instances, the defendant is a person who is either victimizing the corporation or using the corporation as a tool to engage in racketeering. This case does not involve any allegation that the Mohawk corporation or any other corporation constitutes such a legal-entity enterprise.

The instant case involves the second category of associations, those that are a "union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). By its express terms, that association-in-fact category of enterprise does not include groups of corporations. Congress used the term "individuals" in the context of the RICO statute in the ordinary sense of the word to mean "an individual human being" and not a corporation or other entity. *See Clinton v. New York*, 524 U.S. 417, 428 n.13 (1998) (citing Webster's Third New International Dictionary 1152 (1986)). By adopting this interpretation, however, one need not go so far as to conclude that "corporations . . . are not 'individuals' under

any accepted usage of that term." *Id.* at 454 (Scalia, J. concurring in part and dissenting in part).[2] The context and structure of the RICO statute confirm that Congress intended this interpretation of the term for purposes of RICO.

First, the structure of Section 1961(4) reveals that in the single sentence defining a RICO "enterprise" Congress used the word "individual" twice. The first use of the term "individual" is in the legal-entity prong of the definition, which states that "enterprise" includes "any *individual*, partnership, corporation, association, or other legal entity." 18 U.S.C. § 1961(4) (emphasis added). That use of "individual" must be read to mean a single human being because otherwise it would be surplusage, and result in a construction that should be avoided. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Congress expressly included "corporation" in the legal-entity prong of the definition as well as the catch-all phrase "or other legal entity." Congress would have had no reason to also add the term "individual" to mean a generic concept broad enough to cover corporations. The only reason for adding the term "individual" would have been to mean it to refer to a single human being which would not otherwise have been covered by the list. This same meaning of "individual" as a single human being should be given to the second use of the term in that same sentence because when Congress

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[2] In *Clinton v. New York*, this Court construed "individual" synonymously with the broader term "person," but only because, in the specific context of the line-item veto statute at issue there, to do otherwise "'would produce an absurd and unjust result which Congress could not have intended.'" 524 U.S. at 428-429 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)). Lower courts have given different answers to the question whether "individual" refers only to human beings in different contexts. *See, e.g., In re Oliver North (Gadd Fee Application)*, 12 F.3d 252, 254-255 (D.C. Cir. 1994) ("individual" as used in the Ethics in Government Act's fee provision means human being); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175-1176 (C.D. Cal. 2005) ("individual" as used in the Torture Victim Protection Act means human being, but citing cases deciding the issue differently).

uses the same term more than once in the same provision, "it seems reasonable to give each use a similar construction." *Reves*, 507 U.S. at 177. Thus, "individual" means a single human being in the phrase "group of individuals associated in fact" in the second prong of the "enterprise" definition.

Second, the overall statutory framework reveals that Congress used the term "individual" in another statutory definition in RICO to mean a single human being. Congress provided that, as used in RICO, "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). If that use of "individual" were broad enough to include a corporation then the term "or entity" would be surplusage because Congress could have accomplished the same result by defining a person simply to include "any individual capable of holding a legal or beneficial interest in property" and it would have covered corporations.

Third, the definitional provisions of Title 18, where RICO is codified, use the term "individual" to exclude organizations. Section 18 provides that, "[a]s used in this title, the term 'organization' means a person other than an individual." 18 U.S.C. § 18. By defining an "organization" as something "other than an individual," Congress made clear that "organization" does not mean an "individual" and "individual" does not mean "organization." The terms are intended to be mutually exclusive. Because a corporation is clearly an organization, it is a "person" under Title 18 but not an "individual."[3]

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[3] Although not part of the RICO statute itself, other provisions of Title 18 corroborate that "individual" generally excludes "organization," and vice versa. For example, the maximum fine for one who "organizes, manages, or supervises a continuing financial crimes enterprise" is $10 million "if an individual," and twice that "if an organization." 18 U.S.C. § 225. And certain provisions of the Sentencing Guidelines apply "only if the defendant is an individual," U.S. Sentencing Guidelines §§ 5E1.3, 8E1.1, while others apply only in the "Sentencing of Organizations," *id.* at § 8A1.2.

In sum, Congress defined the term "enterprise" in RICO to mean a legal entity (including a corporation) standing alone, as well as a less formal association that does not constitute a legal entity, but only if such an association is a union or group of "individuals." A group comprised of a corporation plus others is not a RICO "enterprise" because a corporation is not an "individual."

2. This Court should use the occasion of this case to halt the lower courts' misguided expansion of the RICO "enterprise" definition

Lower courts have given short shrift to Congress's definition of "enterprise," but for reasons that need not long detain this Court.

a. Some lower courts have cited Congress's use of the term "includes" at the beginning of the "enterprise" definition ("'enterprise' includes * * * ") and held that the list of entities that follows "is not meant to be exhaustive," so that an informal group including corporations can constitute an association-in-fact enterprise. *See, e.g., Perholtz*, 842 F.2d at 352-353.[4] But those courts fail to appreciate the varied linguistic roles of the term "includes."

The term "includes" "may be used as a word of enlargement," but that is its "exceptional sense, as the dictionaries and cases indicate." *Montello Salt Co. v. Utah*, 221 U.S. 452, 466 (1911). Its "ordinary" use is to "specify particularly" those items which fall within a classification.

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[4] *See also United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *but see United States v. McClendon*, 712 F. Supp. 723, 730 (E.D. Ark. 1988) (noting that "Congress could have simply inserted the words 'corporations or other legal entities' after the word 'individuals' in the second prong" of the definition, but recognizing that the court could not do so); *Benard v. Hoff*, 727 F. Supp. 211, 215 (D. Md. 1989) ("[c]orporations cannot under RICO associate in fact to constitute an enterprise").

Ibid. Courts cannot rely on the broader meaning of "include[s]" to "render[] nugatory" the "careful process of exclusion and inclusion pursued by Congress." *Corporation Comm'n of Oklahoma v. Federal Power Comm'n*, 415 U.S. 961, 968 (1974) (Rehnquist, J., dissenting from summary affirmance).

Congress used the term "includes" in its Section 1961(4) definition of "enterprise" "as a term of limitation, indicating what belongs to a genus." *Blankenship v. Western Union Tel. Co.*, 161 F.2d 168, 169 (4th Cir. 1947) (*citing Montello Salt Co.*, 221 U.S. at 466). Otherwise, there is no limit to what might constitute a RICO "enterprise." There would also be little practical relevance to this Court's recognition of "an enterprise" as one of four elements of Section 1962(c) that limits the reach of RICO. *See Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

Congress used "includes" similarly in other RICO definitions to be exhaustive. For example, the RICO definition of "Attorney General" states: "'Attorney General' *includes* the Attorney General of [the] United States * * * or any employee of the department [of Justice] or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter." 18 U.S.C. § 1961(10) (emphasis added). By contrast, where Congress intended to be illustrative rather than exhaustive, it used the phrase "including, but not limited to * * * " in the RICO statute. *See, e.g.*, 18 U.S.C. § 1964(a) (authorizing equitable remedies "including, but not limited to" dissolving the enterprise). Thus, there is no reason to believe Congress intended its definition of "enterprise" to be open-ended.

b. A second reason that some courts have given for construing the association-in-fact prong of the RICO "enterprise" definition to include groups of corporations is that to do otherwise would, according to those courts, mean "that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO." *United States v. London*, 66 F.3d 1227, 1244 (1st

Cir. 1995) (quoting *Perholtz*, 842 F.2d at 343), *cert. denied*, 517 U.S. 1155 (1996); *United States v. Masters*, 924 F.2d 1362, 1366-1367 (7th Cir. 1991), *cert. denied*, 508 U.S. 906 (1993).

But that is by no means true. The prohibitions of RICO make it unlawful for any "person" to engage in the prohibited conduct. Thus, an individual criminal can be charged as a RICO defendant under 18 U.S.C. § 1962(c) even if he formed a corporate shell. Further, as discussed above, "person" is defined in RICO to include any "entity capable of holding a legal or beneficial interest in property" which, of course, includes corporations. 18 U.S.C. § 1961(3). Thus, a corporation also clearly can be charged as a RICO defendant, even though it cannot be deemed part of an association-in-fact RICO enterprise. For example, if a corporation participates in the conduct of the affairs of its state regulatory agency, which is a legal-entity enterprise under RICO, by bribing the officials of the enterprise and thus operating or managing that enterprise, the corporation would be liable under Section 1962(c). *Cf. H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 233-234 (1989).

Indeed, a corporation, as a legal entity, can constitute a RICO enterprise standing alone and those persons, corporate or otherwise (other than the enterprise itself), who conduct its affairs through racketeering are liable as RICO defendants under Section 1962(c). Just because the language of the statute prevents plaintiffs from consolidating into a single artificially-constructed "enterprise" all corrupted legal entities does not mean that it exempts from RICO liability any person who corrupts more than one legal entity. Thus, if groups of corporations or other legal entities are corrupted, any person conducting the affairs of those entities through racketeering would be liable for multiple violations of Section 1962(c) because each corrupted corporation or other legal entity would constitute a separate RICO enterprise and would support a separate RICO charge.

Finally, in complex schemes, a person, corporate or otherwise, may be liable under Section 1962(d) for conspiracy to violate one or more of the other RICO prohibitions, 18 U.S.C. § 1962(a)-(c).[5] In appropriate circumstances, a corporation may also be liable as a defendant under any statute that would otherwise have been charged as a predicate offense.

c. Some lower courts also have construed "enterprise" in an overly broad manner by invoking the RICO clause that provides that RICO "'shall be liberally construed to effectuate its remedial purposes.'" *See, e.g., Huber*, 603 F.2d at 394 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)). This clause, however, "is not an invitation to apply RICO to new purposes that Congress never intended." *Reves*, 507 U.S. at 183. It also butts up against the rule of lenity, which requires that RICO, like any criminal statute, be strictly construed with ambiguities resolved in favor of the accused. *See Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003); *FCC v. American Broad. Co.*, 347 U.S. 284, 296 (1954) (statutes that permit both civil and criminal remedies "are to be construed strictly"). Moreover, although in appropriate circumstances either statutory canon may "serve[] as an aid for resolving ambiguity," they are "not to be used to beget one." *Turkette*, 452 U.S. at 587 n.10 (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)). Here, there is no ambiguity when the language of the statute is considered in its entirety because it is clear that only a group of "individuals," and not a group

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[5] Section 1962(c) addresses only one of the four activities prohibited by RICO. Those other prohibitions also reach conduct by persons such as corporations. The other three prohibitions are against: persons using income derived from racketeering to acquire interest in an enterprise affecting interstate commerce (18 U.S.C. § 1962(a)); persons acquiring or maintaining an interest or control, through a pattern of racketeering, of an enterprise affecting interstate commerce (18 U.S.C. § 1962(b)); and persons conspiring to violate the other three prohibitions of the section (18 U.S.C. § 1962(d)).

consisting of corporations and others, constitutes an association-in-fact enterprise under RICO.

d. Interestingly, the failure of some lower courts to abide by the plain language of the RICO definition of an association-in-fact enterprise is what created for them the other problem presented by this case – a defendant being charged with conducting the affairs of an enterprise that is not distinct from the defendant itself. To take a single example, in *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991), the court faced a situation where an individual defendant was alleged to have corrupted several legal entities (a law firm and two police departments), but the entities were treated by the court collectively as one "enterprise" under RICO. Several years later, in a different case, the court refused to revisit its unduly broad interpretation of the statutory definition of "enterprise," but nonetheless held that an employer and its employees could not constitute a RICO enterprise simply because it was a too "far-fetched possibility," even though that court's precedent would have supported a contrary outcome. *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 266 (7th Cir. 1997).

A straightforward reading of the statutory text would more easily have resolved both of that court's cases. A correct reading of the association-in-fact enterprise definition would have allowed a bright-line dismissal of the second case (and cases like the instant one) where a corporation is both charged as the RICO "person" alleged to have violated Section 1962(c) and identified as a part of the association-in-fact enterprise with those who carry out the corporation's business affairs. In the first case, it would merely have meant that the defendant would have to be charged with corrupting three legal-entity enterprises rather than one conglomerate enterprise.

3. This Court should resolve this case based on the plain meaning interpretation of association-in-fact enterprise to prevent circumvention of this Court's decision in *Reves*

The merits of the plain meaning interpretation of the association-in-fact "enterprise" definition perhaps come into sharpest focus if one considers the alternative. If this Court were to construe a RICO association-in-fact enterprise to encompass a corporation in a group with other legal entities or individuals, it would create an opening for circumvention by plaintiffs of the holding in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), that a person conducts or participates in the conduct of a RICO enterprise in violation of Section 1962(c) only if the person participates in the operation or management of the enterprise.

In *Reves*, this Court refused to hold an accounting firm liable under Section 1962(c) for alleged fraud in the preparation of the financial statements of a cooperative. 507 U.S. at 186. The cooperative had been properly identified by plaintiffs as a RICO enterprise, and the Court reasoned that the accountants, as outsiders to the cooperative, had played no part in conducting or participating in the conduct of the enterprise's affairs. *Id.* at 179.

If, however, a single association-in-fact "enterprise" could be artificially constructed by cobbling together the accounting firm and the cooperative, the opposite result would obtain. The accountants would remain outsiders to the cooperative, but they would become insiders to this synthetic "enterprise." The accounting firm, by conducting its own affairs as part of the combined enterprise, necessarily would have played "some part in directing the enterprise's affairs," if the "enterprise" included itself as well as the cooperative. *Ibid.* This Court would have found the "operation and management" test satisfied, and would not have affirmed summary judgment in favor of the accounting firm.

In other words, those courts (like the court of appeals in this case) who read the association-in-fact "enterprise" definition to include any mish-mash of entities thereby read out of the statute not only the limits of the definition; they also nullify this Court's "operation and management" test. Almost any defendant can be said to operate or manage the affairs of an association-in-fact enterprise if the boundaries of the enterprise may be purposefully drawn to bring in the defendant. The RICO statute is broad, but it was never intended to be limitless through such a misconstruction of the statutory text.

In this case, because the alleged enterprise was a group of corporations and individuals, that group was not a RICO enterprise under Section 1962(c), and the decision of the court of appeals should therefore be reversed on that ground.

B. A Corporation Conducting Its Own Affairs With The Assistance Of Other Entities Or Individuals Is Not, By Virtue Of That Assistance Alone, Conducting The Affairs Of An Enterprise In Violation Of RICO Section 1962(c)

1. To violate Section 1962(c), a RICO defendant must conduct, through a pattern of racketeering, the affairs of an enterprise distinct from the affairs of the defendant itself

A corporation is liable as a person for violation of Section 1962(c) when, through a pattern of racketeering activity, it influences or corrupts a RICO enterprise with which it is associated. To establish liability under Section 1962(c), the plaintiffs "must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). A corporation cannot be sued or prosecuted under Section 1962(c) for conducting its

own affairs, even if it is alleged to have done so through a pattern of racketeering activity.

This requirement for a RICO enterprise distinct from the defendant follows from the language of the statute. First, Section 1962(c) requires that the accused "person" be "employed by or associated with" the subverted "enterprise." 18 U.S.C. § 1962(c). The accused "person" cannot be identical to the "enterprise" because one does not speak of a person being "employed by or associated with" itself. *See Cedric Kushner Promotions*, 533 U.S. at 161. Second, reinforcing the requirement that the "enterprise" be distinct from the defendant person, Section 1962(c) reserves liability for persons who have "conducted or participated in the conduct of the *'enterprise's* affairs,' not just their *own* affairs." *Reves*, 507 U.S. at 185 (quoting 18 U.S.C. § 1962(c) (emphasis in original)).

Because a corporation is a legal construct, it can act only through others. A corporation often acts through the individuals that it hires as employees. A corporation also often acts, however, through non-employees that it retains for a specific purpose, such as independent contractors.[6] A corporation might engage recruiters to locate workers as in the instant case, and it also might engage a myriad of others to perform other specialized tasks. For example, corporations regularly hire underwriters to raise capital; dealers to sell the manufacturers' products; accountants to audit corporate accounting books; lawyers to draw up contracts; real estate brokers to assist in procuring property; security companies to protect corporate personnel and facilities; advertising agencies to build demand for products; manufacturers to create components for products; health maintenance organizations to provide benefits for employees; management consultants to assist

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[6] An employee generally is a fiduciary who acts on behalf of another and is subject to his control, whereas generally "[a]n independent contractor is a person who contracts with another to do something for him but who is not controlled by the other." *See Restatement (Second) of Agency* §§ 1-2 (1958).

in strategic planning; plumbers and electricians to build or maintain facilities; and innumerable other varieties of service providers. All of these entities assist a corporation in conducting its own business affairs.

The requirement for an enterprise distinct from the defendant thus has special resonance in this context. This Court recognized as much in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001), where it was dubious of an "oddly constructed entity" as a RICO "enterprise" that was alleged to consist of a corporation together with its employees and agents. The Court observed that it is awkward to speak of a corporate "person" being "employed by" or "associated with" an enterprise consisting of the corporation and its employees and agents. *Id.* at 164 (discussing *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994)).

Whether a corporation hires an individual as an employee, subcontracts with an individual or another corporation, or conducts certain of its affairs through a subsidiary, the analysis under RICO should be the same. Just as a corporation conducting its own affairs through its own employees does not violate the prohibition of Section 1962(c) according to well-reasoned and unanimous case law in the lower courts, a corporation conducting its own affairs with assistance from non-employees also does not violate Section 1962(c).[7] In either scenario, the

[7] Numerous lower courts have so held. *See, e.g., Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1062-1064 (2d Cir. 1996), *rev'd on other grounds*, 525 U.S. 128 (1998) (defendant holding company, together with its subsidiaries, attorneys, accountants, and other agents not a distinct RICO entity); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303-304 (3rd Cir. 1991) (manufacturer defendant and its advertising agency not a distinct RICO enterprise); *Entre Computer Ctrs., Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279, 1287 (4th Cir. 1987) (defendant franchiser and franchisee not a distinct RICO enterprise); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987) (defendant bank, its holding company, and three employees not a distinct RICO enterprise); *Fitzgerald*, 116 F.3d at 228 (defendant automobile corporation, with its subsidiaries, dealers, and trusts not a

(Continued on following page)

activities of the corporation are the same; it is conducting its "*own* affairs." *Reves*, 507 U.S. at 185. Thus, when a corporation conducts its affairs the only way it can, *i.e.*, through others, it does not "conduct or participate * * * in the conduct of" the affairs of a distinct RICO enterprise. 18 U.S.C. § 1962(c).

This rule does not immunize corporations from liability under Section 1962(c) for the reasons already discussed. *See* pages 10-12, *supra*. A corporation is liable as a RICO defendant if it conducts (or participates in conducting), through a pattern of racketeering, the affairs of an enterprise with which it associates, but which is distinct from the corporation itself.

In this case, the allegations against the Mohawk corporation are that it contracted with outside agencies to recruit people to hire, albeit in violation of the immigration laws. *See, e.g.*, J.A. 23-24. Because Mohawk was having the outside agencies conduct its own business affairs, the allegations do not establish that the corporation was conducting a distinct RICO enterprise and therefore do not allege a violation of Section 1962(c), so the decision of the court of appeals must be reversed.

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distinct RICO enterprise); *Brannon v. Boatmen's First Nat'l Bank of Oklahoma*, 153 F.3d 1144, 1147 (10th Cir. 1998) (defendants bank holding company and subsidiary lender not distinct RICO enterprises); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 141 (D.C. Cir. 1989) (en banc) (defendant union and its business agent not a distinct RICO enterprise), *cert. denied*, 501 U.S. 1222 (1992).

2. The contrary ruling of the court of appeals improperly threatens a corporation with treble damages based on use of contractors to conduct the corporation's business affairs, which is a common business practice that is critical to the efficiency of the Nation's economy

a. Corporations contracting with those outside the corporation to provide goods and services to conduct the affairs of the corporation is a well-established and growing trend nationwide. As of 2005, 10.3 million individuals work as independent contractors in this country, totaling 7.4% of the total civilian American workforce, and contingent workers (*i.e.*, workers who do not have a contract or expectation for ongoing employment) account for another 1.8% to 4.1% of the workforce. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Contingent and Alternative Employment Arrangements, February 2005* (July 27, 2005), at 1, *available at* http://www.bls.gov/news.release/pdf/conemp.pdf. Typically, small corporations (less than 500 employees) use independent contractors and contingent workers in goods-producing industries, while larger corporations use contingent workers in the service industry. *See* Joel Popkin & Co., *Labor Shortages, Needs and Related Issues in Small and Large Businesses, Part B: Contingent Workers in Small and Large Firms (Final Report): Presented to the Office of Advocacy, U.S. Small Business Administration* (1999), at 10, *available at* http://www.sba.gov/advo/research/rs195btot.pdf.

Moreover, entire sectors of the Nation's service economy, such as law and accounting firms, investment banks, private security companies, computer consultants, and employment recruitment agencies, are designed to assist corporate clients to conduct their affairs though the use of non-employees.

The increase in the use of independent contracting is due to the benefits gained by both corporations and individual workers. Many corporations find that relying on outside firms to provide discrete goods or services frees the

company to focus on its core competencies. *See Partners in Wealth: The Ins & Outs Of Collaboration*, The Economist, January 21, 2006 (Survey: The Company: The New Organisation), at 16; Andrew Leonard, *This Nerd for Hire*, Salon, April 17, 1997, *at* http://archive.salon.com/p/articles/mi_m4021/is_n2_v18/ai_17966617 ("Silicon Valley corporations rely on independent contractors and other forms of "temporary" labor more heavily than companies in any other U.S. region. In the home of the virtual corporation, everything, ideally, is contracted out – marketing, manufacturing, distribution – and everyone is an independent contractor. Flexibility is king."). In particular, corporations increasingly retain others to perform vital human resource functions. *See Partners in Wealth*, *supra*, at 16-17. Such focus is necessary to compete in the global marketplace.

In addition, independent contractors are likely to increase innovation and can be a source of knowledge creation for corporations. *See* Timothy J. Vogus & Theresa M. Welbourne, *Structuring for High Reliability: HR Practices and Mindful Processes in Reliability-Seeking Organizations*, 24 J. Organiz. Behav. 877, 882, 897 (2003), *available at* http://www.eepulse.com/documents/pdfs/HR practices.pdf; Sharon F. Matusik & Charles W. Hill, *The Utilization of Contingent Work, Knowledge Creation, Competitive Advantage*, 23 Acad. of Mgmt. Rev. 680, 683, 685-688 (1998).

Use of independent contractors also benefits a corporation because it enhances its ability to rapidly adjust workforce size as demand for a corporation's products or services shifts. *See* Courtney von Hippel *et al.*, *Temporary Employment: Can Organizations and Employees Both Win?* 11 Acad. of Mgmt. Exec. 93, 94-95 (1997).

The availability of independent contractors directly benefits individuals as well. It allows individuals who are employees of a corporation to focus on the corporation's core mission, and leaves non-core administrative and operational functions, such as maintaining the payroll or

cleaning the office, to specialized independent contractors. *See* Jan Larson, *Temps Are Here to Stay*, 18 American Demographics 26, 28 (Feb. 1996), *available at* www.findarticles.com/p/articles/mi_m4021/is_n2_v18/ai_17966617.

At the same time, it allows individuals who prefer flexibility to work as, or for, independent contractors themselves. *See, e.g.*, Larson, *supra*, at 30-31; Janet H. Marler *et al.*, *Boundaryless Organizations and Boundaryless Careers: A New Market for High Skilled Temporary Work* (Cornell Univ. CAHRS Working Paper Series, Working Paper 98-01), at 12, 22-23 (1998), *available at* http://instruct1.cit.cornell.edu/courses/ilrhr769/98-01.pdf (individuals who did not want to be permanent employees "enjoyed work flexibility because they could choose when to work").[8] There is some evidence that "married women in the workplace who desire more flexible schedules and individuals who retire and reenter the workforce as independent contractors explain the increases in the supply of individuals" working as contingent workers. Janet H. Marler, *Alternative Work Arrangements*, in *Work-Family Encyclopedia* (Patricia Raskin & Marcie Pitt-Catsouphes eds., 2004), at http://wfnetwork.bc.edu/encyclopedia_entry.php?id=219. Independent contractors generally are more educated than the remainder of the workforce. *See* Popkin, *supra*, at i.

b. The threat of treble damages under RICO should not be allowed to undermine corporate decisions to contract out certain business functions rather than hire employees to perform them in-house. That decision is properly guided by a corporation's fiduciary duty to its

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[8] *See also* Robin F. DeMattia, *Change Is Part of Temporary Worker's Job*, N.Y. Times, April 19, 1998, § 14WC, at 41 ("'There's a great interest by people who want to be independent contractors and control their own job growth and destiny,' Ms. Gray said. 'I think part of it is Generation X, where people don't want to get tied down to one company or such a routine.'"); Andrew Leonard, *This Nerd for Hire*, *supra* ("independent contractors are more content with the flux of their work lives – they luxuriate in the freedom to spend more time with their children or to work at home").

owners and "[d]ramatically expanding RICO liability because of a business organization choice makes little sense from a policy perspective." *Brannon*, 153 F.3d at 1147.

RICO's civil action is an "unusually potent weapon – the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Designed to deter and extirpate organized crime, its expanding scope through lower court interpretations provides an improper tool to induce settlements from legitimate businesses that cannot risk the possibility of being subjected to an award of treble damages and attorneys' fees. *See* 18 U.S.C. § 1964(c). "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima*, 473 U.S. at 506 (Marshall, J. dissenting) (citing ABA Report, *supra*, at 69).

In addition to the financial penalties, businesses experience "an almost inevitable stigmatizing effect" when sued in federal court under a statute associated with racketeers and mobsters. *Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990); *see also* H.R. Rep. No. 91-1549, at 187 (dissenting views of Reps. Mikva, Conyers, and Ryan) ("What a protracted, expensive [civil RICO] trial may not succeed in doing, the adverse publicity may well accomplish – destruction of [a defendant's] business.").

This Court has long recognized the potential for abuse of the civil RICO statute. More than two decades ago, it expressed "concern over the consequences of an unbridled reading of the statute," observing that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 481, 500 (citing ABA Report, *supra*, at 55-69); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring) (reach of "the federal mail and wire fraud laws is vast" but "exists against a backdrop of prosecutorial discretion," whereas

"[n]o such check operates in the civil realm"); *Scheidler*, 537 U.S. at 412 (Ginsburg, J. concurring) (reiterating concerns of *Sedima*, 473 U.S. at 481, 500).

To prevent such abuse of civil RICO, the statute must be read consistent with its text and origins so that its potent remedies can be wielded only against the evils that motivated Congress to enact the legislation. It is undisputed that "RICO's major purpose was to attack the 'infiltration of organized crime and racketeering into legitimate organizations.'" *Reves*, 507 U.S. at 185 (quoting S. Rep. No. 91-617, at 76 (1969)).

The court of appeals' ruling, however, is not limited to preventing a person or entity from victimizing a business, or subverting a corporation to further its distinct criminal purposes. *See Cedric Kushner Promotions*, 533 U.S. at 165-166. The court's holding creates incentives for corporations to internalize more functions and hire more employees, leading to possibly less efficient and competitive operations and harming the interests of individuals as workers, shareholders, and consumers. Those incentives have no relationship to preventing the type of abuse for which RICO was designed. As Judge Posner noted: "What possible difference * * * can it make that Chrysler sells its products to the consumer through franchised dealers rather than through dealerships that it owns, or finances the purchases of its motor vehicles through trusts, or sells abroad through subsidiaries? We have never heard it suggested that RICO was intended to encourage vertical integration, yet that is the only effect that we can imagine flowing from" a rule allowing RICO claims against "Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does." *Fitzgerald*, 116 F.3d at 227.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below with regard to the federal RICO claims.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,
Petitioners

v.

SHIRLEY WILLIAMS, BALE PELFREY, BONNIE JONES, AND LORA SISSON, INDIVIDUALLY AND ON BEHALF OF A CLASS,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE IMMIGRATION POLITICAL ACTION COMMITTEE, U.S., INC., THE FEDERATION FOR AMERICAN IMMIGRATION REFORM, THE CENTER FOR AMERICAN UNITY, THE AMERICAN UNITY LEGAL DEFENSE FUND, NEGATIVE POPULATION GROWTH, INC. AND THE U.S. IMMIGRATION REFORM POLITICAL ACTION COMMITTEE, AS *AMICI CURIAE* SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether a defendant corporation and its agents can constitute an "enterprise" under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968 ("RICO"), in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some larger enterprise and not just its own affairs.

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INTEREST OF AMICI CURIAE

The purpose of this brief is to illustrate the enormous change in the immigration enforcement environment in the decade since Congress amended RICO to explicitly add alien smuggling, harboring and hiring as predicate crimes. Counsel for all parties have consented to the filing of amicus briefs in support of either party and their letters of consent have been lodged with the Clerk.[1]

Petitioner Mohawk Industries, Inc. ("Mohawk") emphasizes the possible impact of the decision below on "routine corporate" operations. *See, e.g.*, Pet'n, at 17 ("The rule [below] would, in effect, make a broad range of *routine* corporate conduct actionable under RICO.") (emphasis added). The several *amici* who filed briefs in support of Petitioner similarly emphasize the "routine" nature of Mohawk's conduct. "Mohawk has done nothing more than conduct a *routine* and essential business task." Brief of the National Association of Manufacturers, *et alia*, as *Amici Curiae* in Support of Petitioner ("NAM *Amici* Br."), at 7 (emphasis added).

Amici filing this brief believe that the "routine" behavior alleged in this case was intended by Congress to be illegal, and that Congress amended RICO in 1996 to cover precisely this "routine" behavior. *Amici* believe this case offers the Court an opportunity to protect RICO's purposes and fulfill Congressional intent to protect American workers.

The Immigration Political Action Committee ("ImmPAC") is a federal political action committee,

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[1]Pursuant to Rule 37.6, *Amici* certify that no person or entity other than *Amici* made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

organized in 1983. ImmPAC's principal purpose is to support enforcement of the immigration laws. ImmPAC was a strong supporter of the 1986 Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603, which prohibited hiring an unauthorized alien. 8 U.S.C. § 1324a. ImmPAC was also a strong supporter of Cong. Peter King's and Patrick Kennedy's amendment adding alien harboring, smuggling and hiring to the list of RICO predicate crimes.[2] This provision, now 18 U.S.C. § 1961(1)(F), is the basis for the RICO claim at issue in this action.

U.S., Inc., is a Michigan charitable corporation concerned, *inter alia*, about immigration and its effects on American workers. U.S. publishes a magazine and website on this and related topics. www.thesocialcontract.com.

The Federation for American Immigration Reform is a national, nonprofit membership organization of concerned citizens who share a common belief that American immigration policies must be reformed to serve the national interest. www.fairus.org. FAIR was a major proponent of the 1986 enactment of the prohibition against hiring illegal immigrants.

The Center for American Unity is a national, non-profit educational organization dedicated to preserving Americans' historical unity. www.cfau.org. The American Unity Legal Defense Fund is a national, non-profit public interest law firm established in 2001 to defend human and civil rights, including the rights of American workers who are faced with

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[2]This provision, which originally passed the House as Section 7 of the Criminal Alien Detention Improvement Act of 1995, 141 CONG. REC. 588 (daily ed. Feb. 10, 1995), became Title IV, Subtitle D, Section 434 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 214.

displacement by illegal immigrant workers. www.americanunity.org.

Negative Population Growth, Inc., is a national membership organization founded in 1972 to educate the American public and political leaders about the detrimental effects of overpopulation on our environment, resources and quality of life. www.npg.org. NPG has long supported strong enforcement of the immigration laws.

The U.S. Immigration Reform Political Action Committee, an independent federal political action committee, supports effective worksite immigration law enforcement as essential to deter illegal immigration. www.usirp.com.

STATEMENT OF CONTEXT

> [Christopher] *Walters stated that in approximately March 1997, due to an INS worksite operation conducted on several Wal-Mart stores located in the St. Louis area, Wal-Mart fired IMC* [Walter's company] *as a cleaning contractor. Walters stated that Mr. Leroy Schuetz, then Division Vice-President, Operations Branch at Wal-Mart Headquarters, informed him that IMC was fired because they used illegal aliens as their cleaning crews. . . . Walters further stated that Schuetz told him to create different companies if he [Walters] wanted to do business with Wal-Mart again. Schuetz explained that if Walters created different companies and if one company was fired for employing illegal aliens, Walters could continue to do business with Wal-Mart through other companies.*

This statement, from a federal affidavit unsealed in November 2005,[3] captures the three major themes of this case:

- businesses' relentless drive for efficiencies, including a search for lower-cost and compliant workers;
- federal law's absolute prohibition on the use of illegal immigrants as workers; and
- many businesses' attempts to evade these prohibitions, by using subcontractors or simply ignoring federal law.

Each of these themes is discussed below, but none can be understood without reference to an overwhelming and overarching factor: the collapse of worksite immigration law enforcement in the ten years since Congress amended RICO to include hiring illegal immigrants as a predicate crime. Since 1996, enforcement of federal immigration law in the workplace has essentially ceased.

In the Immigration Reform and Control Act of 1986, Congress prohibited the hiring of unauthorized aliens ("employer sanctions"). 8 U.S.C. § 1324a.

> As we have previously noted, IRCA "forcefully" made combating the employment of illegal aliens central to "[t]he policy of immigration law." *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991). It did so by establishing an extensive

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[3]Affidavit of Patricia M. Mullin, Acting Special Agent in Charge of the United States Immigration and Customs Enforcement ("Mullin Aff."), *attached* to Application and Affidavit for Search Warrant, *In the Matter of the Search of David Glass Drive Technology Center, Wal-Mart Corporation*, Case Number FA-03-23, filed October 22, 2003, U.S. District for the Western District of Arkansas, at 41-42, available at: www.walmartjanitors.com/staticdata/Exhibit_A_to_SAC.pdf.

> "employment verification system," § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3).

Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147-48 (2002).

Employer sanctions have never been successful, largely because they have never been enforced. "[E]nforcement of employer sanctions has been beset by difficulty from the start." H. Rep. No. 104-469, at 129. "Hundreds of thousands of aliens unauthorized to work in the United States have used fraudulent documents to circumvent the process designed to prevent employers from hiring them. In many instances, employers are complicit in this activity." U.S. General Accounting Office, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, April 10, 2003, GAO-03-660T, 5-6.

Public officials continue to criticize the hiring of illegal immigrants. "We've got to crack down on employers who flout our laws." "President Signs Homeland Security Appropriations Act for 2006," Oct 2005, 4, www.whitehouse.gov/news/releases/2005/10/20051018-2.html.

Nevertheless, the reality of worksite immigration enforcement is substantially different from the rhetoric:

> The worksite enforcement program is one of various ICE [U.S. Bureau of Immigration and Customs Enforcement] immigration enforcement programs, and has been a relatively low priority. Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8

U.S.C. § 1324a] and the number of administrative worksite arrests have *declined*. . .

U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, ("*Immigration Enforcement*"), August 2005, GAO-05-813, at 30 (emphasis added).

GAO's bland language masks the true extent of the "decline[]." Since the 1996 RICO amendments, there has been a "decline" of 99.1% in workplace arrests for violations of the prohibitions on hiring illegal immigrants, and a "decline" of 99.7% in issuance of penalties to employers.

Simply put, employer sanctions enforcement has collapsed in the last ten years. Here are the actual workplace immigration law enforcement statistics since the 1996 RICO amendments:

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
1997	17,554	865
1998	13,914	1,023
1999	2,849	417
2000	953	178
2001	735	100
2002	485	53
2003	445	162
2004	159	3

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
2005 (7 months)	81	N/A

1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: *Immigration Enforcement, supra*, 35, 36, Figures 4 and 5.

This collapse has been public knowledge for several years. Louis Uchitelle, "I.N.S. Is Looking the Other Way As Illegal Immigrants Fill Jobs," *The New York Times*, March 9, 2000, C1, col. 1, http://select.nytimes.com/gst/abstract.html?res=FB0E1FFE345C0C7A8CDDAA0894D8404482.

Employers are apparently taking advantage of the opportunity to preferentially hire illegal immigrants. "A startling new study[4] shows that all of the growth in the employed population in the United States over the past few years can be attributed to recently arrived immigrants." Bob Herbert, "Who's Getting the New Jobs," *The New York Times*, July 23, 2004, A23, col. 6, http://select.nytimes.com/gst/abstract.html?res=F60D10FF3D590C708EDDAE0894DC404482.

This study found that "new immigrants have . . . *captured all of the net gains in employment* over the past four years." University Communications and Public Relations, "New Report Reveals Nation's Growing Dependence on Foreign

[4]Sum, Fogg, Khatiwada and Palma, "Foreign Immigration and the Labor Force of the U.S.," Center for Labor Market Studies, Northeastern University, www.nupr.neu.edu/7-04/immigrant_04.pdf.

Immigrants Since 2000," Northeastern University, July 23, 2004, 1 (emphasis added), www.nupr.neu.edu/7-04/immigration_july04.shtml.

In other words, "all of the net" new American jobs are going to "new immigrants,"[5] many of them illegally present in the United States. This job "capture" has changed the composition of the American workforce: "One of every seven people working in the United States in 2004 was born elsewhere; a decade earlier, only one in ten workers was foreign born." Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, ("CBO Study"), November 2005, Preface.

This job "capture" has also decreased the wages paid to native-born workers. "[Professor George J.] Borjas [of Harvard University] calculated that the average weekly earnings of native-born men as a group would be reduced by 3 percent to 4 percent," CBO Study, *supra*, 23, *citing*, George J. Borjas, "The Labor Demand Curve *Is* Downward Sloping: Re-examining the Impact of Immigration on the Labor Market.," 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374.

The impact of this job transference is not equally shared: "Those most affected by the influx of new immigrant workers are young, less well-educated American workers and so-called established immigrants, those who have been in the

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[5]The authors differentiated immigrants only by length of time in the United States, not by legal status, although they acknowledge that many immigrants in their study were illegally present in the United States. *Id.*, n. 13. The most recent estimates suggest that half of all "new immigrants" are illegal immigrants. Steven Cammarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, Center for Immigration Studies, December 2005, http://www.cis.org/articles/2005/back1405.html

U.S. for a number of years." Herbert, *supra*. Professor Borjas notes that "high school dropouts" would experience the "largest adverse impact [on wages] . . . about nine percent lower than they would be in the absence of increased competition from foreign-born workers." CBO Study, *supra*, 23-24.

An even greater shift toward "new immigrants" in the workforce is expected in the future. CBO Study, *supra*, 25 ("future labor force growth is likely to be largely the result of immigration.")

This is the modern immigration law environment. Any claim that corporations must be allowed to engage in "routine and essential business task[s], hiring employees", NAM *Amici* Br., 7, must take into account the current environment in which corporations face no risk of federal enforcement of the prohibitions against hiring illegal immigrants, and some apparently consider violating immigration law as "routine."

SUMMARY OF ARGUMENT

Petitioner argues that RICO should not harm economic efficiency, but RICO's purpose, in these circumstances, is to protect American workers. Congress amended both the immigration laws and RICO in 1996 to insure that employers who knowingly hired illegal immigrants were subject to the heightened penalties and civil liability of RICO. Whatever focus RICO had on traditional organized crime "families" in the past, at least after 1996, Congress explicitly intended RICO to be used on immigration crimes. Economic efficiency does not seem to play a role in this post-1996 RICO focus.

RICO's new role in stopping immigration-related crime is particularly important in light of the collapse of federal worksite law enforcement. Numerous instances

across the country demonstrate that employers are continuing to hire illegal immigrants in clear and knowing violation of federal law. In the highly-publicized Wal-Mart Stores, Inc., case, the use of illegal immigrant workers continued even after the company entered into a federal consent decree promising not to do so. The many cases coming to the courts indicate that Wal-Mart is not alone in knowingly, willfully and repeatedly hiring illegal immigrants, using subcontractors or otherwise.

In light of the collapse of worksite immigration law enforcement, Petitioner's request to exempt corporations from potential RICO liability should be seen for what it is: a request to avoid any realistic threat of enforcement, governmental or civil, for hiring illegal immigrants.

Nor should the definition of "enterprise" be allowed to insulate corporations from RICO coverage. This Court's precedents indicate that RICO enterprises can involve corporations and their employees, even those conducting the corporation's own business, if they have separate legal rights and responsibilities. There is no logical reason to exempt the use of contracts executed with third-party outsourcing contractors from that rule. The contracts and an alleged course of conduct in executing responsibilities under those arrangements should be sufficient to show both legal separateness and the other RICO enterprise requirements.

Despite Petitioner's concerns, it has the keys to safety in its inventory already. As shown in the business media, all employers need to do to avoid RICO liability under the post-1996 amendments is educate and manage both their employees and their contractors to avoid knowingly hiring illegal immigrants. Both RICO and the immigration laws provide sufficient protection of legitimate businesses from any realistic threat. But Petitioner asks for more, so much

more that it threatens the integrated structure Congress erected in 1996. Petitioner is asking for the right to do by contract what Congress forbid it to do directly.

ARGUMENT

I. RICO's Purpose, In This Circumstance, Is To Protect American Workers, Not to Promote Business Efficiency.

The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96 to Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations ("RICO"). 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985); *Russello v. United States*, 464 U.S. 16, 26-29 (1983). One of the purposes of RICO was "the need to protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.'" *Cedric Kushner Promotions, Ltd., v. King*, 533 U.S. 156, 165, *citing* S.Rep. No. 91-617, at 82 (1969). Similarly, RICO "protects the public against those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.'" *Id.*, *citing National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994).

Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1). Congress was aware in 1996 that employer sanctions were not effective in stopping employers from hiring illegal immigrants. H. Rep. 104-469, at 129 (1995). In 1996, Congress amended the list of RICO predicate crimes to include "any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. §

1324] (relating to bringing in and harboring certain aliens) . . . if the act . . . was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F). That same year, Section 274 was expanded to include multiple hiring of illegal immigrants. 8 U.S.C. § 1324(a)(3)(A), Pub.L. 104-208, Div. C, Title II, § 203(b)(4). Thus, Congress intended an integrated structure for applying RICO to the organized hiring of illegal immigrants.

Though presented as a RICO claim, this case involves allegations of multiple violations of the immigration laws.[6] Petitioner Mohawk and supporting *amici* prefer to address only "a routine and essential business task, hiring employees." NAM *Amici* Br., 7. Indeed, Petitioner has rewritten the Question Presented in its Opening Brief to highlight just this distinction: "Whether a defendant corporation and its agents *engaged in ordinary, arms-length dealings* . . ." Pet. Br. at *i (emphasis added).

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[6]As noted by the court below, this case comes to the Court on a Rule 12(b)(6) Motion to Dismiss, and all well-pled facts must be accepted as pled. 411 F.3d 1252, 1255 n. 1. There is, as yet, no finding that Mohawk actually engaged in "hundreds, even thousands, of violations of federal immigration laws." 411 F.3d at 1257.

Nevertheless, Petitioner's and supporting *amici*'s attacks on Respondents' "exceedingly thin" allegations, Pet. Br., 7, misunderstand the federal "notice pleading" system. *See, e.g., Swierkiwicz v. Sorema, N.A.* 534 U.S.506, 512-13 (2002) (pleading need only give defendant fair notice of the plaintiff's claim and the grounds upon which it rests). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). As many of the courts below have suggested, discovery and other proceedings may uncover exactly the information which Petitioner and supporting *amici* claim RICO requires for proof.

Petitioner and supporting *amici* argue that RICO's purpose is solely to address "gangs and organized crime families," or "mob famil[ies]," Pet. Br. 4, 25, and is not intended to "undermine corporate decisions to contract out certain business functions rather than hire employees to perform them in-house." Brief *Amici Curiae* of the Chamber of Commerce of the United States of America, *et alia* ("Chamber *Amici* Br."), 21.

The danger asserted by Petitioners and supporting *amici* is that the "court's holding [below] creates incentives for corporations to internalize more functions and hire more employees, leading to possibly less efficient and competitive operations. . . These incentives have no relationship to preventing the type of abuse for which RICO was designed." Chamber *Amici* Br., 23.

RICO, however, does not appear to be concerned with efficiency, at least when it comes to immigration predicate crimes. It could be more efficient for a business to smuggle and hire illegal immigrant workers, who, as shown above, work for lower wages and depress the wages of native workers. And it could also be more efficient for a business to use subcontractors to hire illegal immigrants who are then "loaned" to the business, as alleged here. 314 F.Supp.2d at 1340.

Nevertheless, each of those acts is prohibited by federal law. As shown above, employer sanctions prevents the hiring of unauthorized aliens, even if they are the most efficient workforce available. 8 U.S.C. § 1324a. In 1996, the same year it amended the RICO predicate acts, Congress expanded the prohibitions against harboring and smuggling aliens to include repeated hiring of unauthorized aliens. 8 U.S.C. § 1324(a)(3)(A).

Efficiency is not the purpose of these prohibitions. As this Court has long recognized, a "primary purpose in restricting immigration is to preserve jobs for American workers." *I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991); *Sure-Tan, Inc.v. NLRB*, 467 U.S. 883 (1984).

The RICO sections at issue in this case incorporate the immigration laws' purpose of protecting American workers. As amended by Congress, RICO's purpose was to protect American workers (and not coincidentally, the immigrants themselves) from employers who would break the laws for profit. The 1996 RICO amendment was, in fact, specific to protecting against exploitation of smuggled illegal immigrants. As the sponsors of this amendment noted:

> In the past couple of years we have heard about boatloads of Chinese immigrants being brought to the United States under horrifying conditions – weeks with no clean water, minimal food, and unsanitary conditions beyond imagination. The gangs responsible for smuggling these people into the United States then force them into slave labor, working 12- to 14-hour days, 7 days a week in gruesome conditions just to pay off the $30,000 to $40,000 debt they incurred. These horrible abuses at the hands of people willing to profit from the trade of human beings must be stopped.
>
> The purpose of this provision is to address the problem of slave trade, where traffickers use the dream of America and freedom to lure people into the bondage of slavery for their own profit.

141 CONG. REC. H1590 (Feb. 10, 1995) (Statement of Cong. Kennedy).

Though Cong. Kennedy's language may be hyperbolic and may not apply to any parties to this case,[7] the sponsor's statement indicates that Congress's purpose was to stop an odious practice, and not to recognize concerns about efficiency in hiring. Just as Congress believed that employer sanctions would remove a magnet for illegal immigration, Congress believed that using RICO remedies to stop the employment of illegal immigrants would also help stop the "horrifying conditions" to which the immigrants may have been subject. In this case, if the allegations are correct, Mohawk and its subcontractors were at least complicit in the practices which Congress intended RICO to be used to stop.

To adopt Petitioner's formulation of RICO's purpose would vitiate Congress's express purpose in amending that law to stop practices which it deemed particularly objectionable, substituting a generalized sentiment in favor of business freedom and efficiency. Thus, Petitioner's and supporting *amici*'s position that the decision below would create "incentives for corporations to internalize more functions and hire more employees, leading to possibly less efficient and competitive operations. . . These incentives

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[7]Sadly, some of the claims in the various Wal-Mart-related cases involve present-day charges strikingly similar to those which sparked congressional action ten years ago; for example, illegal immigrant workers were being locked inside stores at night against their will, though the defense was that this was for security reasons. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 334-35 (D.N.J. 2005). Similar abuses are reported regularly around the country. *See, e.g.*, Elissa Silverman, "Pay Fight in Tech's Trenches; Day Laborers for a Verizon Subcontractor Say They were Cheated," *The Washington Post*, Feb. 16, 2006, D1, col. 2 (cable construction workers not paid).

have no relationship to preventing the type of abuse for which RICO was designed," Chamber *Amici* Br., 23, is not supported by the text or history of RICO. The abuses alleged in this case are precisely those Congress had in mind when it amended both the immigration laws and RICO in 1996.

II. Employers, Weighing Efficiency Against the Likelihood of Punishment Under Federal Law, Are Continuing to Hire Illegal Immigrants:

Employers know that they are unlikely to suffer adverse consequences from hiring illegal immigrants. The lower cost and uncomplaining illegal immigrant labor pool gives employers a huge economic incentive to break the immigration laws. As a result, major, high-profile employers repeatedly and knowingly hire illegal immigrants, and conspire with outside contractors to do so.

The most significant recent example is Wal-Mart Stores, Inc.[8] Federal officials tout the recent consent decree entered against Wal-Mart Stores, Inc.,[9] and several

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[8]The 2001 indictment of Tyson's Foods might also be considered significant. *See, Trollinger v. Tyson's Foods, Inc.*, 370 F.3d 602, 606 (6th Cir. 2004).

[9]Many of the allegations raised against Wal-Mart Stores are set forth in a District Court opinion, which, in part, dismissed without prejudice RICO claims filed by some of the illegal immigrant workers who allegedly were involved in the case. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 300-311 (D.N.J. 2005). Judge Greenaway denied the RICO claims, in part, because the complaint did not allege that Wal-Mart had actual knowledge that the aliens were brought into the United States in violation of law. *Id.*, 393 F.Supp.2d at 309. After the Mullin affidavit, *supra*, was unsealed last November, the plaintiffs in *Zavala* submitted a Second Amended Complaint with more allegations about Wal-Mart's

(continued...)

contractors who conspired with Wal-Mart executives to hire illegal immigrants as "the two most significant enforcement actions taken by the United States in the field of immigration employment sanctions since the laws prohibiting employment of illegal aliens were first enacted in 1986."[10]

This announcement, however, illustrates much more, including how a major corporation knowingly, willfully and repeatedly hired illegal immigrants even after being prosecuted. The investigation was triggered in 1998, by a hit-and-run accident in Honesdale, Pennsylvania.[11] A license plate, left at the scene, *id.*, led local law enforcement officials to investigate whether illegal immigrants were working at a local Wal-Mart store.[12] Finally, in 2001, federal agents raided Wal-Mart stores in Pennsylvania, New York, Ohio and Missouri, and arrested approximately 100 illegal immigrants. ICE News Release, *supra*.

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[9](...continued)
actual knowledge that its subcontractors were hiring illegal immigrants. www.walmartjanitors.com/staticdata/Second_Amended_Complaint.pdf.

[10]Office of Public Affairs, U.S. Immigration and Customs Enforcement, "Wal-Mart Stores, Inc. Agrees to Pay a Record $11 Million to ICE to Settle Nationwide Worksite Enforcement Investigation" ("ICE News Release"), March 18, 2005, 1, http://www.ice.gov/graphics/news/newsreleases/articles/walmart031805.htm.

[11]Michael Barbero, "Wal-Mart to Pay $11 Million," *The Washington Post*, March 19, 2005, B1, http://www.washingtonpost.com/ac2/wp-dyn/A48612-2005Mar18?language=printer.

[12]Chris Strohm, "DHS Calls on Corporations to Come Clean on Hiring Illegal Immigrants," *GovExec.com Daily Briefing*, March 18, 2005, www.govexec.com/story_page.cfm?articleid=30800.

Nevertheless, Wal-Mart continued using contractors who hired illegal immigrants. On October 23, 2003, ICE agents arrested approximately 245 illegal immigrant workers at some 60 Wal-Mart stores in 21 states. *Id.*

Wal-Mart executives first denied knowing that their contractors and stores were using illegal immigrant workers, but further investigation revealed that "recorded conversations of unidentified Wal-Mart executives, managers and contractors showed that immigration violations 'continued to occur with direct knowledge by the Wal-Mart corporation.'"[13]

As the Mullin affidavit quoted above indicates, not only were Wal-Mart executives knowledgeable about the hiring of illegal immigrants by subcontractors, but they encouraged and directed them to do so. "Schuetz explained that if Walters created different companies and if one company was fired for employing illegal aliens, Walters could continue to do business with Wal-Mart through other companies." Mullin Aff., *supra*, at 42.

Incredibly, even prosecution and the consent decree do not appear to have deterred Wal-Mart executives.[14] Only

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[13]Jerry Seper, "Wal-Mart Pays $11 Million to Settle Alien Case," *The Washington Times*, March 19, 2005, www.washingtontimes.com/function/print.php?StoryID=20050318-104421-2951r.

[14]These limited prosecutions involved only a total of about 345 illegal immigrant workers out of a Wal-Mart domestic workforce of 1,200,000 workers. Associated Press, "Wal-Mart Mops Up Immigrant Flap," CBS News.com, March 18, 2005, www.cbsnews.com/stories/2005/03/18/national/printable681593.shtml. And the fine is an insignificant financial event for the world's largest retailer. "[F]or Wal-Mart, which made $289 billion in retail sales last

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seven months after the touted consent decree, Wal-Mart again was caught using hundreds of illegal immigrants, in Pennsylvania and North Dakota.[15]

The Wal-Mart case is not before this Court, although a RICO claim by former employees is pending in the District of New Jersey. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295 (D.N.J. 2005). The Wal-Mart case, however, illustrates the dangers inherent in the approach proposed by Petitioner and supporting *amici*. Over a number of years, Wal-Mart Stores engaged in a variety of tactics with its contractors to hire and utilize illegal immigrants, even after entering a consent decree promising not to do so. Wal-Mart allegedly hired legal workers only until it was considered "safe" to hire illegal workers again.[16] These tactics were approved and managed by corporate executives who initially denied they were breaking the law.

Of course, most American companies do not knowingly hire illegal immigrant workers. Yet the allegations in the several other similar cases in the circuit courts discussed in the briefs here indicate that the Wal-Mart case is

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[14](...continued)
year, it will take about 16 hours of sales to pay it off." Seper, *supra*.

[15]Michael Rubinkam, "Raid at Wal-Mart Site Yields Arrests of 125 Illegal Immigrants," *The Miami Herald*, Nov. 19, 2005, http://www.miami.com/mld/miamiherald/business/national/13205837.htm ?template=contentModules/printstory.jsp.

[16] *See, e.g., Mattus v. Facility Solutions, Inc.* ___ F.Supp.2d ___, (D.N.J., No. Civ. 05-0863 (DRD), Nov. 21, 2005), slip op., *3, 2005 WL 3132190 (former employees of Wal-Mart cleaning contractor allege that the store and its contractor "allegedly conspired to 'disguis[e] [Wal-Mart's] use of illegal immigrant labor by quickly and temporarily hiring legal workers until it was deemed safe to hire cheap, illegal labor again.").

not an isolated or aberrant instance. Employers in various regions of the country apparently routinely and intentionally hire illegal immigrant workers. *See, e.g., Baker v. IBP, Inc.*, 357 F.3d 685, 686-87 (7th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004) (allegations that "about half of the employees at IBP's Joslin meatpacking plant are aliens who cannot work lawfully in the United States and that IBP not only knows in a statistical sense that many of its workers lack the sort of visas that authorize working here but also can identify which ones they are, yet winks at obviously fake green cards and other spurious credentials."); *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 379 (2d Cir. 2001) (janitorial company which did not hire illegal immigrants sued competitor which had been prosecuted for hiring hundreds of illegal immigrants); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002)(alleging widespread hiring of illegal immigrant farm workers); *Trollinger*, 370 F.3d at 606 (employees' suit followed federal indictment of Tyson's Foods, Inc., for conspiracy to smuggle aliens into the United States and hiring illegal immigrants at 15 plants in nine states).[17]

This is the form of business arrangement which Petitioner and supporting *Amici* seek to have the Court shield under an absolute protection from RICO enforcement. NAM *Amici* Br., 14. *Amici*, for example, contend that permitting a RICO suit in this circumstance would "allow[] plaintiffs to

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[17]As noted above, n. 6, many of these claims are only allegations in pleadings, but this Court has ample evidence that hiring of illegal immigrants is both widespread and "routine" today. *See, Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (those without work authorization do not receive the same benefits under the NRLA as persons whose employment is lawful); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984).

use a statutory tool designed to prevent the misuse of organizations and eradicate organized crime against corporations that have simply adapted to the economic realities of doing business in the Twenty-First Century global economy." *Id.*

As shown above, the "economic realities" are simply a vanishingly-small chance of being caught hiring illegal immigrants, and the "design[]" of RICO was recently amended to specifically include the hiring of illegal immigrants. Thus, if the purpose of RICO is to "protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.'" *Cedric Kushner Promotions,* 533 U.S. at 165, or to "protect[] the public against those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed,'" *id., amici*'s description seems incomplete.

Despite the many euphemisms surrounding the hiring of illegal immigrants, the act of hiring itself has been a federal crime for twenty years. The prohibitions against such hiring are central to the policy of immigration law. *National Center for Immigrants' Rights,* 502 U.S. at 194, and n. 8.

This is not a case of plaintiffs over-reaching, using a statute outside Congress's intention. In *Sedima,* for example, this Court noted complaints that RICO had become something different from its roots, but said that any defect was for Congress to remedy. 473 U.S. at 499-500. Here, on the other hand, Congress wanted RICO used in these circumstances, and expressly amended RICO, after *Sedima,* to cover just this circumstance. 141 CONG. REC. H1590 (Feb. 10, 1995) (Statement of Cong. Kennedy).

Congress recognized "the need to protect the public from those who would run 'organization[s] in a manner

detrimental to the public interest.'" *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 165. Congress intended to cover those who would hire illegal immigrants. In other words, Congress amended RICO to protect American workers.

RICO is not just to be enforced by federal authorities. Congress enacted a specific form of private remedy for RICO violations, over the vociferous objections of those who thought it would be used for "malicious harassment." *Sedima*, 473 U.S. at 487-88. These private remedies are particularly important where there is no governmental law enforcement. Given the immense problem posed by the collapse of federal worksite immigration law enforcement, this Court should avoid disabling this limited remaining protection for American workers.

The Court must be realistic about what is being asked of it. Petitioner's and supporting *amici*'s request to be shielded simply "because American businesses increasingly rely on independent agents and contractors in carrying out routine commercial activities," NAM *Amici* Br. 9, should be seen for what it is: a request for this Court's blessing to routinely engage in a federal crime without fear of enforcement activity, governmental or private.

III. Corporations Should Not Be Allowed to Fashion Their Own Contracts to Evade Congressional Intent:

The question in this case is whether a corporation and its agents can constitute an "enterprise" under RICO. Restated under the facts alleged in this case, the question is whether Mohawk Industries, its employees, and its outside, third-party contractors were functioning as an "enterprise" to recruit, hire, transport, and conceal illegal immigrants. For example, did Mohawk's agreement with contractor

Temporary Placement Services ("TPS"), a wholly-separate legal entity which recruited and employed illegal immigrants and "loan[ed] these workers to" Mohawk "for a fee," 314 F.Supp.2d at 1340, constitute an "enterprise?"

RICO makes it unlawful "for any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (emphasis added). The term "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

An "association in fact" form of "enterprise" has no specific requirements as to form or composition. "There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580. "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.*, 452 U.S. at 583. An association in fact enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.*

In this case, the allegations, unchallenged at this procedural stage, seem to indicate that Mohawk and its contractors associated together for the common purpose of engaging in a course of conduct of procuring, supplying, recruiting and hiring illegal immigrants – a RICO predicate crime. The purpose of these extensive efforts was allegedly to profit from a lower-cost and more docile workforce. This

seems like the sort of "gang" which Cong. Kennedy intended to cover with the 1996 RICO amendment.

For example, the allegations indicate that TPS recruited illegal immigrants, hired them, contracted with Mohawk over a period of time for the employees' "loan," and that Mohawk negotiated the contract, paid for and managed the "loan" of the workers. 314 F.Supp.2d at 1340. This arrangement seemed to "function as a continuing unit." *Turkette*, 452 U.S. at 583. TPS stayed in business and Mohawk got low-cost, non-complaining workers.

Mohawk allegedly also had different arrangements with other employment contractors and its own employees, including providing housing for the illegal immigrant workers, travel to the Brownsville, Texas, area to recruit illegal immigrant workers, and incentive payments for successful recruiting. 411 F.3d at 1255-56. Mohawk allegedly destroyed documents and assisted illegal immigrant workers to evade detection. 411 F.3d at 1255. Again, these seem like the type of activities Congress intended to cover in 1996.

Petitioner and supporting *amici* make much of the word "individual" in the text of the statute as arguably not including corporations or associations in fact which count corporations as members. *See, e.g.*, Pet. Br., 12-26. This argument, however, is not consistent with this Court's precedents.

This Court recently unanimously found an "enterprise" consisting of a corporation and its sole employee/shareholder, who was conducting the affairs of the corporation within the scope of his authority as the corporation's employee. *Cedric Kushner Promotions*, 533 U.S. at 160. This Court found that the employee was

"distinct" from the enterprise, and that the RICO provision applied. *Id.*

The Court said that the test under RICO was whether "the person and the victim, or the person and tool, are different entities, not the same." 533 U.S. at 162. "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that." 533 U.S. at 162-63. Again, *Kushner* clearly looks at an arrangement which includes a corporation.

The Court noted that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or *whom it employs*." *Id.*, 533 U.S. at 163 (emphasis added). This distinction was consistent with RICO's basic purposes: to protect a legitimate enterprise from those who would use unlawful acts to victimize it and to protect the public from those who would use an enterprise as a vehicle to conduct unlawful acts. 533 U.S. at 164, *citing, Turkette*, 452 U.S. at 591, and *Nat'l Org. For Women*, 510 U.S. at 259.

The Court said that a "corporate employee who conducts the corporation's affairs through an unlawful RICO 'pattern . . . of activity,' [18 U.S.C.] § 1962(c)," uses that corporation as a "vehicle." *Id.* The Court focused its analysis on the need "to protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.' S. Rep. No. 91-617, at 82." *Id.*, at 165.

The objection raised in *Kushner* is identical to that raised in this case: that a corporation can only act through its directors, officers, and agents. *Id.* The Court, however, found

its analysis consistent with that principle. "It does not deny that a corporation acts through its employees; it says only that the corporation and its employees are not legally identical." 533 U.S. at 166.

Petitioner does not suggest how the "enterprise" in *Kushner*, which includes a corporation, would fare under its proposed reformulation of "enterprise" which would exclude corporations.[18] In this case, the only distinction is whether the *Kushner* "not legally identical" analysis should move beyond employees who act for the corporation to third-parties who perform corporate acts by contract. "Because more and more corporations rely on outside recruiting firms and staffing agencies to supply necessary labor, a rule that enables plaintiffs to plead an association-in-fact enterprise solely because a defendant corporation contracted with an independent service agent will result in an increase in the number of businesses exposed to RICO liability." NAM *Amici* Br., at 14.

Leaving aside the fact that Mohawk allegedly did far more than simply hire (including recruit and conceal), Mohawk cannot argue that it has the identical legal status of its contractor TPS, even though TPS was, by contract, its agent. They are separate entities, with separate legal rights, which they chose to adjust by contract between themselves. If they were prosecuted for violating the immigration laws,

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[18]Nor does Petitioner address how its proposed insulation of corporations from RICO would capture "people willing to profit from the trade of human beings,"141 CONG. REC. H1590 (Feb. 10, 1995), if those "gangs," *ibid*, were to include a corporation in their "enterprise." The immigration laws are intended to prohibit businesses from employing large numbers of illegal immigrants; indeed, that was the whole point of the 1996 amendment to include multiple hiring in the older smuggling and harboring prohibition. 8 U.S.C. § 1324(a)(3)(A).

Mohawk and TPS could be convicted on different predicates. TPS, for example, could be convicted of hiring and then "loaning" unauthorized aliens wholly apart from any conviction for Mohawk; the distinction might be that TPS knew the aliens were unauthorized while Mohawk had no actual knowledge, and thus could not be convicted under either the multiple hiring prohibition at issue here, or the contractor anti-abuse provision in employer sanctions. 8 U.S.C. 1324(a)(3), 1324a(a)(4).

Indeed, under the *Kushner* analysis, the contract itself should be *prima facie* evidence that there are two separate and distinct entities which chose to adjust their rights and responsibilities between them. They are "legally different," "not legally identical." *Kushner*, 533 U.S. at 163, 166. "And we can find nothing in the statute that requires more 'separateness' than that." 533 U.S. at 163.

Despite *amici*'s protests about modern business practices, they do not argue that modern practices have put an end to contracts. Indeed, what they claim to seek as the highest expression of this Court's action are "economically efficient and mutually beneficial contracts with third-party service providers." NAM *Amici* Br., at 21.

What Petitioner is requesting, then, is the ability to fashion its own contractual arrangements to avoid liability for hiring illegal immigrants. What it could not do directly, it seeks to do by contract.

What is critical about this contractual relationship is that Congress anticipated just this defense by those who would seek to hire illegal immigrants. IRCA provides not just liability for those who hire unauthorized aliens directly, but also for those who use contractors to do so. 8 U.S.C. § 1324a(a)(4). Otherwise, employer sanctions would be undercut by contractual arrangements to shift the criminal

exposure to middlemen. Whether or not this type of arrangement was actually followed by Mohawk and its contractors, Congress clearly intended to foreclose an avenue to evade employer sanctions by contract.

The same principle is applicable to the RICO "enterprise" issue as well. This Court should not place the keys to enforcement in the hands of those with an incentive to violate the law. Without federal enforcement, employers will fashion their arrangements to avoid any hint of private civil liability.

The converse is also true: a decision recognizing potential legal liability would strongly encourage businesses to abide by the law. Such a decision would simply recognize the structure Congress crafted in 1996 to protect American workers using the RICO remedies. Given the absence of federal worksite immigration law enforcement, allowing private civil suits under RICO might be the only remaining form of immigration law enforcement. This prospect is what concerns Petitioner and supporting *amici*.

Ironically, however, the path to safety is not difficult, even if it is not "efficient." All corporations need do to avoid RICO claims is to train and manage their employees to avoid hiring illegal immigrants, and to require in those enticing third-party outsourcing contracts that their contractors do so as well. Just as news about the failure of worksite immigration law enforcement has been publicized, so has this practical remedy. "In all likelihood, employers will be forced to counter this new assault by exploring proactive dialogue with their vendors to establish the type of policies, contract terms and communications that can be used as evidence that

the employer and staffing agencies are doing everything possible to abide by the law."[19]

The key to this protection for employers is in the employer sanctions requirements that employment be "knowing," 8 U.S.C. § 1324a(a)(1)(A), or without verifying an applicant's eligibility to accept employment in the U.S. 8 U.S.C. § 1324a(a)(1)(B). The procedural protections for employers in these requirements are extensive, which is one reason why so few employers have been prosecuted. The burdens of such verification are substantially lessened by new technology. This simple attempt to abide by the 1986 law would likely remove the corporations from the ambit of RICO without disturbing the purposes of the 1996 amendments.

Thus, the Court should recognize and reaffirm the *Kushner* analysis in the context of hiring illegal immigrants.

CONCLUSION

Amici therefore respectfully urge the Court to affirm the decision below.

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[19] Donald W. Benson and Jamie E. Kitces, "New Wave or Flash Flood: 11th Circuit Allows RICO/Immigration Lawsuit to Proceed," *Findlaw Library*, Aug. 24, 2005, *reprinted* at http://library.findlaw.com/2005/Aug/24/194505.html.

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In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CARPET AND RUG INSTITUTE, AND AMERICAN STAFFING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of American manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital importance of manufacturing to America's economic future and living standards.

Associated Builders and Contractors, Inc. (ABC) is a national association representing 23,000 merit shop construction and construction-related firms in seventy-nine chapters across the United States. ABC's membership represents all specialties within the domestic construction industry and is composed primarily of firms that perform work in the industrial and commercial sectors of the industry. ABC serves as the construction industry's voice with the legislative, executive, and judicial branches of the federal government and with state and local governments.

The Carpet and Rug Institute (CRI) is the national trade association representing the carpet and rug industry. The Institute's membership consists of manufacturers representing over ninety-five percent of all carpet produced in the United States as well as suppliers of raw materials and services to the industry. The Institute also coordinates with other segments of the carpet and rug industry, including

[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici has made a monetary contribution to the preparation and submission of this brief.

distributors, retailers, and installers. CRI members and staff are intensely involved in facilitating cooperative solutions to all industry challenges, including in the area of governmental affairs.

The American Staffing Association (ASA) is the largest national trade association representing temporary and contract staffing agencies in the United States. Its more than 1,100 member firms operate over 15,000 offices that generate approximately eighty-five percent of U.S. staffing industry revenues. ASA promotes its members' interests by encouraging ethical business conduct, educating its members regarding laws and regulations applicable to the staffing industry, and fostering public and governmental understanding of the industry and its beneficial role in the economy.

Certain members of the above-listed organizations, as well as other organizations in their industries and trades, have been named as defendants in a number of private civil suits under the Racketeer Influenced and Corrupt Organizations Act (RICO). Amici curiae submit this brief to address the definition of an association-in-fact enterprise under RICO and to apprise the Court of the unfair and deleterious consequences these organizations will face unless the lower court's ruling is reversed.

SUMMARY OF ARGUMENT

The Eleventh Circuit held that a civil RICO plaintiff can state a claim by pleading that a corporation, in the course of conducting its own hiring affairs, committed predicate racketeering acts in "loose or informal" association with other "distinct entities." In this case, the putatively distinct entities were an employment agency and individual employment recruiters. This holding extends civil RICO

liability unfairly and oppressively to corporations that use third-party service providers to conduct the corporations' own normal business operations.

The effects of such a rule, if it were the law of the land, would be both arbitrary and pernicious. All corporations must carry out their business functions by using agents—whether employees, subsidiaries, or third-party contractors. Indeed, the use of third-party contractors is a ubiquitous feature of modern American business practice. Manufacturers, building contractors, and other employers depend upon employment recruiting firms and staffing agencies to fill their permanent and temporary labor needs in a market where qualified employees are scarce. The Eleventh Circuit's expansive rule will encumber American companies with the burdensome costs of preventing and defending against RICO strike suits. A predictable result of such a rule will be to encourage businesses to avoid RICO liability by foregoing economically advantageous relationships with third-party contractors and vertically integrating their business operations. This was not the goal of RICO.

The decision below also should be rejected because it is loose, unclear, and too easily satisfied at the pleading stage. The Eleventh Circuit's holding provides little, if any, guidance to businesses about how to structure their affairs to minimize exposure to RICO claims. This Court should reject the Eleventh Circuit's "test" in favor of the statute's bright-line rule that excludes corporations from the definition of an "association-in-fact" enterprise. Alternatively, this Court should rule that a corporation and the third-party service providers it relies on to carry out normal business operations cannot constitute a cognizable RICO enterprise.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION UNFAIRLY EXTENDS RICO LIABILITY TO CORPORATIONS THAT USE THIRD-PARTY CONTRACTORS, SUCH AS EMPLOYMENT RECRUITING FIRMS AND STAFFING AGENCIES, TO CONDUCT NORMAL BUSINESS OPERATIONS. BECAUSE THESE OPERATIONS MUST BE ACCOMPLISHED THROUGH AGENTS, WHETHER EMPLOYEES, SUBSIDIARIES, OR THIRD-PARTY CONTRACTORS, THE LOWER COURT'S DECISION ARBITRARILY ENCOURAGES INEFFICIENT VERTICAL INTEGRATION AND DISCOURAGES NORMAL CONTRACTUAL RELATIONSHIPS.

The Eleventh Circuit's decision in this case upheld the pleading of a civil RICO claim against a corporation, Mohawk Industries, Inc. (Mohawk), for allegedly conducting the affairs of a larger, fictional "association-in-fact" enterprise comprising Mohawk itself, a temporary placement services entity with which Mohawk had a relatively formal business relationship, and other third-party employment recruiters. *Mohawk Indus., Inc. v. Williams*, 411 F.3d 1252, 1257-60 (11th Cir. 2005). Thus, under the Eleventh Circuit's decision, a plaintiff may state a RICO claim against a corporation merely by alleging that the corporation, in the course of conducting what are essentially the corporation's *own* affairs, committed predicate unlawful acts in association with others. Given the extent to which American businesses rely on agents and third-party contractors to carry out routine commercial activities, this ruling can be expected to have a number of pernicious consequences, particularly, but not

exclusively, in the context of employee recruiting and staffing.[2]

At its core, the Eleventh Circuit's decision rests upon an arbitrary distinction between corporations that use third-party agents to conduct corporate activities and corporations that conduct these activities using their own employees, divisions, or subsidiaries. The Eleventh Circuit's decision thus announces a doctrine that will unfairly and oppressively permit claims to proceed against companies that, short of bringing all contracted services "in house," have no alternative but to associate with third-party contractors. From the perspective of the harms RICO is designed to

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[2] If affirmed, the Eleventh Circuit's ruling is likely to encourage the spread of the type of civil RICO claim presently before the Court, that is, suits alleging that employers hired undocumented illegal aliens using outside recruiting firms and staffing agencies brought by either employees seeking treble damages wages or others alleging they were harmed by the hiring of illegal aliens. In recent years, a number of similar lawsuits have been filed. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004); *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002); *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001); *Canyon County v. Syngenta Seeds, Inc.*, No. CV05-306-S-EJL, 2005 WL 3440474 (D. Idaho Dec. 14, 2005). Counsel for the plaintiffs in *Mendoza* has stated that dozens of employees have contacted him to pursue similar claims in various other industries. *See NPR Morning Edition: Firm Settles Suit Over Undocumented Workers* (NPR radio broadcast Jan. 24, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5169694 (last visited Jan. 24, 2006). Even in cases that do not hold much promise of significant monetary recovery, a ruling affirming the Eleventh Circuit's broad approach to association-in-fact enterprises will encourage civil RICO litigation intended primarily to advance a political agenda. Respondents' counsel presents his RICO lawsuits against corporations that allegedly hire illegal aliens as only one front in a private war. *See* Howard Foster, *Letter from Yakima, WA: On the Fruit Front Line* (Nov. 21, 2003), *available at* http://64.233.167.104/search?q=cache:KnEXtDf9mIcJ:www.vdare.com/misc/foster_yakima.htm+%22hward+foster%22+%22letter+from+Yakima%22&hl=en&gl=us&ct=clnk&cd=1 (last visited Jan. 24, 2006).

address, there is simply no basis for distinguishing between these two approaches to running a business.

A. The Eleventh Circuit's Decision Rests Upon An Arbitrary Distinction Between Corporations That Contract With Third Parties For Necessary Services And Corporations That Perform All Such Functions "In House." This Distinction Is Contrary To RICO's Plain Purposes And Will Tend To Discourage Economically Efficient Corporate Contracting In Favor Of Inefficient Vertical Integration.

The courts of appeals universally have rejected attempts to plead a RICO association-in-fact enterprise where the alleged enterprise consists of the corporation together with its employees, *see, e.g., Riverwoods Chapaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994), or the corporation with its subsidiaries, *see, e.g., Bessette v. Avco Fin. Servs., Inc.* 230 F.3d 439, 449 (1st Cir. 2000). The Second, Third, and Seventh Circuits have reasonably extended this principle to cases involving corporations and third-party service contractors, and have rejected attempts to plead association-in-fact enterprises in cases involving corporations contracting with third-party agents to conduct routine business activity. *See Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-27 (7th Cir. 1997); *Discon, Inc. v. Nynex Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996); *R.R. Brittingham v. Mobil Corp.*, 943 F.2d 297, 300-02 (3d Cir. 1991). These courts have recognized that there is no functional difference between a corporation that conducts certain activities, such as recruiting employees or distributing products, through its own internal divisions or subsidiaries and one that performs these functions through the use of third-party agents. In both instances, the

corporation is simply conducting its own affairs, not the affairs of a separate and distinct enterprise. *See, e.g., Fitzgerald*, 116 F.3d at 227 ("What we cannot imagine, and what we do not find any support for in appellate case law, is applying RICO to a free-standing corporation such as Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does."); *Brittingham*, 943 F.2d at 301 ("We believe a § 1962(c) enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation.").

In contrast to these rulings, the decision below would allow a plaintiff to plead a RICO claim against a corporate defendant simply by alleging that the corporation contracted with third-party service providers to accomplish an essential corporate function, in this case hiring employees. The Eleventh Circuit thus creates an arbitrary and oppressive distinction between corporations that conduct their operations through outside contractors and corporations that conduct these operations internally or through wholly-owned subsidiaries. If, in this case, the plaintiffs had pleaded that Mohawk recruited its employees solely through an internal department charged with identifying and hiring potential employees, the plaintiffs would not have stated a claim under the accepted principle that a corporation together with its employees cannot constitute a RICO enterprise distinct from the corporation itself. Only because Mohawk allegedly retained a third-party recruiter to accomplish this task has the Eleventh Circuit permitted plaintiffs to proceed with their RICO claim. Whether it had used outside recruiters or an internal recruiting department, Mohawk has done nothing more than conduct a routine and essential business task, hiring employees. The Eleventh Circuit offered no reason why Mohawk's use of outside recruiters presented the particular concerns RICO was designed to address.

This Court has identified two distinct purposes underlying RICO. The first of these purposes is to protect corporations from persons and entities that would use the corporations for their own unlawful purposes. *See Cedric Kushner Promotions, Ltd. v. Don King*, 533 U.S. 158, 162 (2001) (identifying as among RICO's purposes "prevent[ing] a person from victimizing, say, a small business" and "prevent[ing] a person from using a corporation for criminal purposes"). The second, distinct purpose of the RICO statute is to facilitate the prosecution of organized crime. *See United States v. Turkette*, 452 U.S. 576, 584 (1981) (observing that RICO addresses not only the misuse of "legitimate businesses," but also the operation of "wholly illegitimate enterprises"). The statute accomplishes its first purpose in part by making it unlawful to "conduct [an] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (2000). The statute accomplishes its second purpose by defining "enterprise" to include "group[s] of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (2000). Consistent with this statutory language and the decisions of this Court, the courts of appeals have consistently identified RICO's twin purposes as the protection of legitimate businesses from criminal misuse and the prosecution of organized crime. *See, e.g., Brittingham*, 943 F.2d at 300; *Sinclair v. Hawk*, 314 F.3d 934, 943 (8th Cir. 2003); *Aetna Cas. & Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1558 (1st Cir. 1994).

There is nothing, however, in the language, legislative history, or judicial interpretations of RICO to support the arbitrary and economically irrational penalization of corporations that use third-party contractors to perform functions that other corporations perform "in house." Amici, like Chief Judge Posner of the Seventh Circuit Court of Appeals, "have never heard it suggested that RICO was intended to encourage vertical integration . . . ." *See*

Fitzgerald, 116 F.3d at 227. To the contrary, it is plainly offensive to RICO's business-protective purposes to transform the statute from a shield designed to protect legitimate businesses from misuse into an arbitrary and discriminatory weapon for suing businesses that rely on third-party service providers. Just as the courts of appeals have unanimously refused to subvert RICO's business-protective purposes by rejecting alleged association-in-fact enterprises predicated on corporations acting through employees and subsidiaries, so too should this Court refuse to apply the statute to the materially identical circumstances of corporations using third-party service contractors.

B. The Use Of Third-Party Service Contractors, Including Recruiting Firms And Staffing Agencies, Is A Ubiquitous Feature Of The Modern American Economy.

The Eleventh Circuit's decision has the potential to expand dramatically the filing of civil RICO claims because American businesses increasingly rely on independent agents and contractors in carrying out routine commercial activities. In particular, a growing number of American companies from diverse industries use third-party recruiting firms to hire permanent workers and third-party staffing agencies to obtain temporary and contract employees.[3] Recruiting firms and staffing agencies perform vital functions for American business, both by reducing the transaction costs involved in matching skilled employees with employers and by enabling

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[3] *See* JESSICA COHEN, WILLIAM T. DICKENS, & ADAM POSEN, HAVE NEW HUMAN RESOURCE MANAGEMENT PRACTICES LOWERED THE SUSTAINABLE UNEMPLOYMENT RATE? 8-10 (2001), *available at* http://www.brookings.org/views/papers/dickens/-20010515.htm (citing various studies documenting the explosive growth of temporary and contract labor in the 1980s and 1990s) (last visited Jan. 23, 2006).

employers to meet their labor demands during periods of relative labor scarcity.[4]

The gap between manufacturers' need for skilled workers and the decreasing number of workers available to meet this demand is one of the most significant problems facing American manufacturers today.[5] This dearth of skilled labor frustrates manufacturers' ability to achieve optimal production levels, increase productivity, and meet consumer demand.[6] In a recent study, eighty-one percent of manufacturers surveyed stated that they were facing a moderate to severe shortage of qualified workers.[7] In addition, fifty-three percent of survey respondents stated that at least ten percent of their total positions currently remain unfilled due to a lack of qualified candidates.[8]

Faced with a shortage of permanent skilled labor, manufacturers and employers in other industries rely heavily on third-party recruiting firms to meet their demand for such workers.[9] Recruiting firms have the resources and expertise

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[4] *See* LAWRENCE F. KATZ & ALAN B. KRUEGER, THE HIGH PRESSURE U.S. LABOR MARKET OF THE 1990S 40 (1999), *available at* http://www.irs.princeton.edu/krueger/working_papers.html (stating that staffing agencies that supply temporary and contingent workers help reduce hiring costs and labor market bottlenecks and facilitate better matches between employees and employers) (last visited Jan. 24, 2006).

[5] *See* DELOITTE CONSULTING & THE NATIONAL ASSOCIATION OF MANUFACTURERS (NAM), 2005 SKILLS GAP REPORT – A SURVEY OF THE AMERICAN MANUFACTURING WORKFORCE 1 (2005), *available at* http://www.nam.org/s_nam/bin.asp?CID=89&DID=235731&DOC=FILE.PDF (last visited Jan. 23, 2006).

[6] *See id.* at i.

[7] *See id.* at 4.

[8] *See id.*

[9] According to the American Staffing Association, independent recruiting firms and staffing agencies are particularly important for companies in all industries during periods of economic growth because companies face rising demand for workers at a time when the labor market often is tightening.

necessary to identify potential employees and match them with appropriate employment opportunities.[10] In contrast, employers often do not have the same ability to identify and match skilled employees with employers' needs. It is often more costly for employers to devote company time and resources to locating and hiring skilled labor than to rely on outside recruiting firms.[11]

In addition to using outside recruiters to satisfy their demand for permanent workers, American companies are increasingly dependent on outside staffing agencies to provide them with temporary, contract, and other contingent employees.[12] The use of temporary and contract workers supplied by outside staffing agencies has expanded substantially since the mid-1990s.[13] By 2004, U.S. staffing

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AMERICAN STAFFING ASSOCIATION (ASA), STAFFING INDUSTRY ECONOMIC ANALYSIS, *available at* http://www.americanstaffing.net/statistics/economic2005.cfm (last visited Jan. 23, 2006).

[10] For example, in confronting a surge in demand for big-screen televisions in 2004, Sony hired 1,700 skilled contingent workers to meet its production needs. Sony used an outside placement firm that had to sift through 15,000 applications just to find the 1,700 employees that were eventually hired. *See* Jim McKay, *Sony ready to hire 1,000*, PITTSBURGH POST-GAZETTE, May 29, 2005, *available at* LEXIS, News Library, Kniritrb File.

[11] In tight labor markets, outside recruiting firms and staffing agencies enjoy economies of scale in recruiting and screening workers, and thus can increase the efficiency with which employees are matched with employers. *See* Susan N. Houseman, Arne L. Kalleberg, & George A. Erickcek, *The Role of Temporary Agency Employment in Tight Labor Markets*, 57 INDUS. & LAB. REL. REV. 105, 125 (2003).

[12] *See* COHEN ET AL., *supra* note 3, at 17-18, 27 (summarizing results of interviews with human resource managers regarding the use of temporary workers supplied by staffing agencies).

[13] The 1990s witnessed an upsurge in the use of contracting, outsourcing, and temporary workers as firms, particularly in the manufacturing sector, reorganized the structure of their hiring of labor in response to increased competitive pressure and technical change. *See* COHEN ET AL., *supra* note 3, at 4-5.

agencies employed an average of 2.55 million temporary and contract workers per day, and had hired a total of 11.7 million employees.[14] American companies rely on outside staffing agencies to provide a reliable source of temporary and contract employees to meet their ever-changing short-term labor needs. The increased use of contract and temporary workers has been a key element of the transformation of the American workplace over the last two decades.[15]

The use of outside staffing agencies to provide temporary and contract workers is particularly important in the manufacturing sector.[16] In the NAM's *2005 Skills Gap Report*, prepared by Deloitte Consulting, one-third of the manufacturing firms surveyed stated that in order to fill their need for highly-skilled employees, they would increase their use of temporary contract workers.[17] Moreover, as noted in a study by the Employment Policies Institute, staffing agencies that supply temporary and contingent workers help to increase employment in the manufacturing sector by providing U.S. companies with the flexibility to adjust their workforces in response to uncertain and ever-changing labor needs.[18] This study found a significant upward trend in the hiring of temporary and contingent workers in the 1990s.[19]

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[14] ASA, *supra* note 9.

[15] *See* COHEN ET AL., *supra* note 3, at 2-4.

[16] *See id.* at 10 (reciting several studies showing the growth in the use of temporary workers in the manufacturing sector).

[17] *See* DELOITTE CONSULTING & NAM, *supra* note 5, at 8.

[18] MARCELLO ESTEVÃO & SAUL LACH, EMPLOYMENT POLICIES INSTITUTE, MEASURING TEMPORARY LABOR OUTSOURCING IN U.S. MANUFACTURING 11-12 (2001), *available at* http://www.epionline.org/studies/estevao_12-2001.pdf (last visited Jan. 25, 2006); *see also* COHEN, ET AL., *supra* note 3, at 18.

[19] ESTEVÃO & LACH, *supra* note 18, at 11.

Outside staffing agencies also play a vital role in the construction industry, an industry that employs 5.6 percent of this country's entire private workforce.[20] While the construction industry as a whole has a relatively steady demand for workers, turnover often is high at individual companies because construction projects are typically of short duration. According to the U.S. Bureau of Labor Statistics, monthly worker turnover in the construction industry can vary between 4.2 and 6.9 percent.[21] This high turnover rate often produces labor shortages, despite the widespread availability of potential employees, due to the high transaction costs of matching available employees to specific employment opportunities. Independent staffing agencies can ameliorate this problem by providing a steady supply of construction workers to construction firms in response to the firms' short-term labor demands. By working with independent staffing agencies, construction firms can avoid the cost of retaining permanent employees in the face of ever-fluctuating demand for construction services, while guaranteeing a pool of available labor that will enable them to respond rapidly to new business opportunities.

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[20] U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ECONOMIC RESEARCH, MAJOR INDUSTRIES BY NAIC'S CODES: PRIVATE EMPLOYER FIRMS, ESTABLISHMENTS, EMPLOYMENT AND ANNUAL PAYROLL BY FIRM SIZE, 1998-2002 (2002), *available at* http://www.sba.gov/advo/research/us_tot_mi_n.pdf (last visited Jan. 24, 2006).

[21] U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, JOB OPENINGS AND LABOR TURNOVER SURVEY (2005), *available at* http://data.bls.gov/cgi-bin/surveymost?jt (last visited Jan. 24, 2006).

C. The Eleventh Circuit's Decision Threatens To Undermine The Stability Of Necessary And Advantageous Business Relationships Between Corporations And Third-Party Contractors By Allowing Such Relationships To Be The Basis For Lengthy And Expensive RICO Suits.

In light of these developments in the business environment, particularly in the manufacturing and construction sectors, the Eleventh Circuit's decision will have a number of pernicious consequences. Because more and more corporations rely on outside recruiting firms and staffing agencies to supply necessary labor, a rule that enables plaintiffs to plead an association-in-fact enterprise solely because a defendant corporation contracted with an independent service agent will result in an increase in the number of businesses exposed to RICO liability. The Eleventh Circuit's unjustifiably relaxed pleading standard for an association-in-fact enterprise may deter corporations from using outside contractors and agents precisely when the use of such agents is becoming increasingly widespread and important to competitive survival. This expansion is unjustified, as it allows plaintiffs to use a statutory tool designed to prevent the misuse of organizations and eradicate organized crime against corporations that have simply adapted to the economic realities of doing business in the Twenty-First Century global economy. There is simply no reason to think that corporations that conduct their hiring activities with the assistance of third-party recruiting firms or staffing agencies pose the threats RICO was designed to combat any more than corporations that conduct these operations "in house."

The problem posed by the Eleventh Circuit's decision lies in its low threshold for pleading an association-in-fact RICO theory. The decision makes clear that very little is

required at the pleading stage, even if "the plaintiffs may be unable to prove such allegations at trial . . . ." *Mohawk*, 411 F.3d at 1258-60. This poses serious consequences even for sizeable corporate defendants. RICO litigation is complex, lengthy, and expensive. Thus, in *Holmes v. Securities Investor Protection Corp.*, this Court adopted a narrower construction of RICO than that advanced by the plaintiff, noting that a contrary approach "would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.'"[22] 503 U.S. 258, 274 (1992) (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 545 (1983)) (brackets in original); *accord Tafflin v. Levitt*, 493 U.S. 455, 465 (1990) (noting "the complexities of civil RICO actions"); *H.J. Inc. v. Northwestern. Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring) (criticizing this Court's ruling in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), for

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[22] Despite this Court's rulings narrowing the construction of RICO, the potential for treble damages and fee shifting have continued to make it popular with private plaintiffs. According to the Administrative Office of the U.S. Courts, 840 civil RICO actions were filed in the year ending March 31, 2005 (of which eight were filed by the United States); 695 in the year ending March 31, 2004 (of which four were filed by the United States); 845 in the year ending March 31, 2003 (of which ten were filed by the United States); 707 in the year ending March 31, 2002 (of which seven were filed by the United States); and 791 in the year ending March 31, 2001 (of which four were filed by the United States). *See* Federal Judicial Caseload Statistics, Table C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit) for each respective year, *available at* http://www.uscourts.gov/library/statisticsalreports.html (last visited Jan. 22, 2006). Although the Administrative Office does not keep track of which RICO cases involve corporate defendants, it is the experience of amici that the vast majority of these cases have been filed against corporations. Furthermore, because the corporate defendant must be "distinct" from the enterprise under *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), a large number of these cases involve creative allegations that the corporation is one member of an association-in-fact enterprise that includes additional entities or natural persons.

creating "years" of litigation and "countless millions in damages and attorney's fees").

These cautionary observations have been borne out by another civil RICO case to come before the Court. *National Organization for Women, Inc. v. Scheidler* was filed in 1986, and this Court first considered it on review of an order granting a motion to dismiss. *See* 510 U.S. 249 (1994) (*NOW I*). After this Court reinstated the complaint, the parties engaged in years of discovery and other proceedings before the case came to this Court a second time. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) (*NOW II*). Twenty years after it commenced, the case is now before the Court for a third decision. *See* Nos. 04-1244 and 04-1352.

II. THE COURT SHOULD ADOPT A BRIGHT-LINE RULE THAT A CORPORATION CANNOT BE A MEMBER OF A RICO ASSOCIATION-IN-FACT ENTERPRISE OR, ALTERNATIVELY, THAT SUCH AN ENTERPRISE CANNOT CONSIST OF A CORPORATION AND THE THIRD-PARTY SERVICE PROVIDERS IT USES TO CARRY OUT ITS NORMAL BUSINESS FUNCTIONS.

The "test" provided by the Eleventh Circuit's decision provides little, if any, guidance to businesses about how to structure their affairs to minimize exposure to civil RICO claims. The Eleventh Circuit's decision permits a civil RICO plaintiff to cobble together an alleged association-in-fact enterprise comprising a corporation and other "distinct entities," no matter how "loose or informal" is the association among them. *See Mohawk*, 411 F.3d at 1258. This is hardly a standard and, indeed, it demonstrates the unduly broad range of conjured enterprises that plaintiffs may plead under *Turkette* and still survive a motion to

dismiss. The confusion on this point explains the split in the Circuits on the issue raised by Petitioner, and also the uncertain exposure of American companies depending upon the Circuit in which they do business. Amici therefore urge this Court to adopt a bright-line rule that enables businesses to plan efficiently while protecting them from meritless RICO strike suits.[23]

A. Bright-Line Rules Should Be Preferred In Cases Affecting Significant Commercial Interests, Because Efficient Business Planning Requires Plain And Predictable Statements Of Legal Rights And Obligations.

In the contest between bright-line rules and imprecise standards, it is generally recognized that rules have to recommend them their clarity, uniformity, predictability, and ease of application. *See* Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 971-78 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke

[23] It might be argued that the Eleventh Circuit's "distinct entities" test already constitutes a bright-line rule. However, as noted in Part I, this Court should reject the Eleventh Circuit's analysis because it is inconsistent with RICO's purposes and ignores the reality that corporations always must conduct their business through agents, often including third parties. Moreover, the Eleventh Circuit's opinion does not actually set forth a bright-line rule. Although the opinion states that the members of an association-in-fact enterprise must be "individual entities," *see* 411 F.3d at 1258 (quotation omitted), and also must be "distinct," *see id.*, there is no explanation of what renders one entity "individual" or "distinct" from another. Thus, at the pleading stage, the Eleventh Circuit's opinion amounts to no more than a "wait and see" approach, and not a bright-line rule. As amici argue in the main text, this Court should issue a clear pronouncement that corporations do not even qualify as "individuals" under RICO's definition of an association-in-fact enterprise. Alternatively, the Court should adopt the same clear rule of limitation applied by the Second, Third, and Seventh Circuits that corporations are never "distinct" from the agents they rely on to conduct normal business activities.

L.J. 557, 571-624 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-81 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379, 384-90 (1985). These considerations are especially important in cases affecting significant commercial interests and commonplace business practices, because efficient business planning requires plain and predictable statements of legal rights and obligations. *See* Sunstein, *supra*, at 976.

The ability of persons and businesses to understand and exercise their legal rights, and to fulfill their legal obligations, is a matter not only of fundamental fairness, but also of economic efficiency. *See* Scalia, *supra*, at 1179 ("Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."); Kaplow, *supra*, at 621 ("[M]any individuals contemplating behavior that may be subject to the law will find it more costly to comply with standards [than with rules], because it generally is more difficult to predict the outcome of a future inquiry . . . than to examine the result of a past inquiry."). Indeed, clarity and predictability are of such importance to business planning that it has become commonplace to observe that a clear rule, even a "bad" one, is better than an unclear rule or no rule at all. *See* Sunstein, *supra*, at 976 ("[I]t may be more important to know what the law is than to have a law of any particular kind."); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 Chi.-Kent L. Rev. 93, 109 (1989) ("[P]articularly in corporate and contractual settings, it is quite easy for parties to contract around whatever liability rule is imposed by courts. In these settings, it doesn't matter what the particular default legal rule happens to be, so long as it's sufficiently clear that parties don't waste resources engaging in needless negotiations.").

This Court has recognized that clear statements of legal norms are particularly important where the norms affect commonplace business transactions. In the area of state use and sales taxes, for instance, this Court has observed:

> Th[e] artificiality [of a bright-line rule], however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes, and reduces litigation concerning those taxes . . . . Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations, and in doing so, fosters investment by businesses.

Quill Corp. v. North Dakota, 504 U.S. 298, 315-16 (1992). As the Court recognized in *Quill Corp.*, the importance of a clear rule to business planning is necessarily accentuated where the rule affects routine business transactions, because the costs of repeated inefficient transactions, economically distorted business practices, and foregone commercial opportunities can accumulate rapidly. *See* Kaplow, *supra*, at 621 ("The central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct. If conduct will be frequent, the additional costs of designing rules—which are borne once—are likely to be exceeded by the savings realized each time the rule is applied . . . . Thus, when behavior subject to the relevant law is frequent, standards tend to be more costly and result in behavior that conforms less well to underlying norms.").

The importance of clarity and predictability increases in direct proportion to the severity of the consequences for noncompliance. A concurrence by four Justices of this Court accordingly recognized that "clarity and predictability in

RICO's civil applications are particularly important" and that "RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc.*, 492 U.S. at 255 (Scalia, J., concurring) (joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy).

Against the clarity, uniformity, and predictability of bright-line rules this Court must, of course, balance the possibility of imperfect outcomes in marginal cases. *See* Scalia, *supra*, at 1178. This Court has recognized, however, that the disutility of imperfect results in unusual cases may be vastly outweighed by the benefits of a well-crafted rule of general suitability: "Our cases provide support for the proposition that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989).

B. This Case Calls For A Bright-Line Rule Excluding Corporations From RICO Association-in-Fact Enterprises Or, Alternatively, A Holding That Such An Enterprise Cannot Consist Of A Corporation And The Third-Party Contractors It Uses To Carry Out Its Normal Business Functions.

It is critical for businesses to have clarity and predictability with regard to the legal liability they may face for their commercial decisions. This includes decisions about how to structure their organizations and with whom to conduct business. If the law creates potential liability for contracting or affiliating with others when there would be no exposure for the same commercial conduct if undertaken unilaterally, that legal liability is a factor that a company

must consider. If, on the other hand, no additional legal exposure is created by hiring third parties to engage in that conduct on behalf of the business, then such a decision will be made based on the merits, including such factors as the quality of the contractor's results and economic efficiency.

Under the Eleventh Circuit's view, a court is required to allow a RICO suit to progress to discovery so long as a plaintiff alleges that a corporate defendant associated itself with some "distinct entity" with which it shared a "common purpose," which could include a goal as pedestrian as "making money." *Mohawk*, 411 F.3d at 1258. This goal is so universal to the notion of business ventures that, if RICO liability could be grounded on this claim, every corporation that maintains contractual and agency relationships could be exposed to treble damages litigation based on an "association-in-fact" theory. The "only effect" of such a RICO rule would be "to encourage vertical integration." *See Fitzgerald*, 116 F.3d at 227. Businesses would seek to shield themselves from the possibility of RICO suits by avoiding economically efficient and mutually beneficial contracts with third-party service providers. In attempting to avoid potential RICO exposure by taking work "in house," businesses would incur significant additional legal and transactional expenses. The cumulative costs of these inefficiencies can reasonably be expected to be enormous. *Cf.* Kaplow, *supra*, at 621. Because such costs would be motivated by a desire to avoid legal liability rather than a desire to achieve economic efficiencies, such a rule would also harm consumers. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 21 (1984) ("If judges tolerate inefficient practices, the wrongly-tolerated practices will disappear under the onslaught of competition. The costs of judicial error are borne by consumers, who lose the efficient practices and get nothing in return."). Service providers too would be injured, because such a rule would create a smaller

market for their services. This in turn could have deleterious consequences for employees, particularly entry-level job applicants who depend upon recruiting firms and staffing agencies to match their skills with employers' needs.

A bright-line holding is appropriate here because this case "fits into a genus in which the balance characteristically tips in one direction." *Reporters Comm.*, 489 U.S. at 776. The Eleventh Circuit's decision exposes Mohawk to massive civil RICO claims based on its alleged use of employment agencies and recruiters to help locate the employees it ultimately hired. This is a routine—indeed, ubiquitous—corporate practice in today's economy. More generally, as the courts of appeals have consistently recognized, the use of agents and employees to accomplish corporate ends is not merely a commonplace practice, it is a necessity arising from the incorporeal nature of the corporate entity. *See Fitzgerald*, 116 F.3d at 227; *Riverwoods*, 30 F.3d at 344; *Brittingham*, 943 F.2d at 301. To base RICO liability on this fact would render RICO's "association-in-fact" provision a meaningless one in cases against corporate defendants, for corporate defendants could *always* be made to fit this Procrustean bed.

This Court's RICO jurisprudence is consistent with the bright-line advocated by amici. As this Court observed the first time it construed RICO's "enterprise" element, "absurd results are to be avoided . . . ." *Turkette*, 452 at 580; *accord Fitzgerald*, 116 F.3d at 226-27 (in deciding whether a corporation can be part of an association-in-fact enterprise, the court noted "a desire to make the statute make sense and have some limits" and to "avoid absurd applications"). This Court again expressed its skepticism of unusual readings of the RICO statute in its most recent pronouncement on the enterprise issue. Although the Court did not rule on the merits of the issue, it noted in *Cedric Kushner* that it would

be "less natural to speak of a corporation" as being associated with its own employees and agents—an "oddly constructed entity." *Cedric Kushner*, 533 U.S. at 164.

Admittedly, in two cases this Court has favored a broader construction of RICO's "enterprise" requirement over a narrower construction. *See Turkette*, 452 U.S. 576; *NOW I*, 510 U.S. at 260-61. In *Turkette*, the Court concluded that the term "enterprise" included illegitimate enterprises along with legitimate enterprises, noting that Congress easily could have narrowed the sweep of the term "enterprise" by adding the limiting word "legitimate" to the definition in Section 1961(4). *See* 452 U.S. at 581. In *NOW I*, the Court engaged in "parallel" reasoning, noting that Congress had not defined "enterprise" to be limited to groups having an economic motive. *See* 510 U.S. at 260-61.

This case, however, requires a different outcome so as to avoid an absurd result at odds with the statute. Whereas the *absence* of limiting language in Section 1961(4) commanded a broader construction of the term "enterprise" in *Turkette* and *NOW I*, here the *presence* of limiting language commands a narrower construction of the term "enterprise." Congress has circumscribed the sweep of association-in-fact enterprises by using the limiting word "individuals" in defining the associations that are cognizable under the statute. *See* 18 U.S.C. 1961(4) ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any *union or group of individuals* associated in fact although not a legal entity") (emphasis added). The "very common" meaning of the word "individual" is "a private or natural person as distinguished from a partnership, corporation, or association . . . ." Black's Law Dictionary 773 (6th ed. 1990); The New Fowler's Modern English Usage 391-92 (3d ed. 1996) ("The *Oxford Advanced Learner's Dictionary of Current English* (4th ed.

1989) defines the noun as follows: 1 a single human being . . . ."). Thus, it is clear from the face of the statute that Congress did not intend for association-in-fact enterprises to include *corporations* associated with others. *Cf. Holmes*, 503 U.S. at 269 n.15 (noting that RICO's statutory language "drowned out" an alternative construction advanced by a civil RICO plaintiff); *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (noting that RICO's liberal construction clause "is not an invitation to apply RICO to new purposes that Congress never intended").

Amici are confident that the rule they have proposed would sufficiently clarify and limit RICO's scope to permit efficient business planning and protect necessary and economically advantageous contractual relationships from meritless RICO attack. Should the Court decline to adopt the proposed bright-line, however, amici urge the Court to resolve the split among the circuit courts by making it clear that a RICO enterprise cannot consist merely of a corporation and the third-party service providers it uses in the course of carrying out its normal business operations. *See, e.g., Brittingham*, 943 F.2d at 300-02; *Baker*, 357 F.3d at 691; *Fitzgerald*, 116 F.3d at 226-27; *Discon*, 93 F.3d at 1064. If this Court were to adopt the Eleventh Circuit's loose definition of association-in-fact enterprise, American businesses will face the needless transactional and litigation costs, incentives for distorted business planning, and foregone commercial opportunities discussed above.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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(9)

No. 05-465

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In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization. Its members (law firms and solo practitioners) represent parties in antitrust, commercial, consumer, employee benefit and pension, civil racketeering and securities fraud cases. NASCAT members, who represent victims of corporate abuse, schemes to defraud and white-collar criminal activity, seek to secure compensation, deter wrongdoers, modify corporate behavior and improve access to justice. We advocate the enforcement of state and federal laws to prevent wrongful, fraudulent and manipulative business practices. NASCAT is interested in this case, which involves civil liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, because our members represent the victims of white-collar crime in civil RICO actions.

INTRODUCTION

Ten years ago, Congress authorized the use of RICO's private enforcement mechanism to remedy violations of federal immigration laws. Section 1961(1) of RICO, which defines "racketeering activity," makes violations of § 274 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324, predicate offenses. In 1996, Congress enacted § 203 of the Illegal Immigration Reform and Immigrant

[1] Counsel for NASCAT hereby certify that the consent of the parties has been obtained to the filing of this brief, that they authored it, that no counsel for either party did it, in whole or in part, and that no other party made a monetary contribution to its preparation or submission.

Responsibility Act ("IIRIRA"), 8 U.S.C. § 1324(a)(3)(A). In turn, that statute amended § 274 of the INA to prohibit employment of illegal aliens. Later, Congress enacted the Antiterrorism and Effective Death Penalty Act, which added the amended § 274 to RICO. Pub. L. No. 104-132, 110 Stat. 1274 (1996). These predicate acts were added to RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1)(F), to "help Federal law enforcement officials" because groups "in this country, with ties to others abroad . . . [had] developed to prey upon illegal immigrants who want to come to the United States." 141 Cong. Rec. H1588 (daily ed. Feb. 10, 1995) (statement of Rep. McCollum).

Petitioner, Mohawk Industries, Inc. ("Mohawk"), seeks to limit RICO's effectiveness in combating illegal immigration by restricting "enterprise" to associations-in-fact of individuals, or by excluding those cases in which corporations use independent agents or contractors to carry out or facilitate illegal hiring of undocumented workers. If Mohawk is successful, the purpose of the 1996 statutory enactments will be thwarted. Mohawk has nothing to fear from the configuration of an "enterprise"; rather, it need only fear legal redress by victims when it violates RICO's predicate offenses, including the immigration law predicate acts.

Contrary to Mohawk's assertions, this case is not about confining RICO to its "original purpose" of fighting "organized crime." Congress debated that question in 1969-1970 and rejected it, just as this Court has repeatedly rejected Mohawk's contentions. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 246 (1989) ("[T]he legislative history shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime."); *Sedima, S.P.R.L. v. Imrex*

Co., 473 U.S. 479, 495 (1985) ("'any person' . . . not just mobsters" may violate RICO). Further, this case is not about "clogging" federal court dockets.[2] RICO actions – particularly in private enforcement of federal immigration laws – represent a significant, but minute, portion of the business of the federal courts.[3]

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[2] The RICO litigation "floodgate" myth is refuted in G. Robert Blakey & Thomas Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God is This the End of RICO?,"* 43 VAND. L. REV. 851, 869-73 (1990) ("Blakey & Perry, *Myths*"). Recent data confirms that study. In 2005, 69,818 federal criminal cases were filed; just 29 were criminal RICO cases. U.S. Admin. Office of Courts, FEDERAL JUDICIAL CASELOAD STATISTICS, Table D-2 (Mar. 31, 2005). Federal civil cases filed totaled 278,712; just 840 were civil RICO cases. *Id.*, Table C-2. Since 1989, when this Court clarified the "pattern of racketeering activity" element, civil RICO case filings have steadily declined. From 1980 to 1996, federal civil cases increased from 168,800 to 272,700 cases per year, *see* U.S. Census Bureau, *Statistical Abstract of the United States*, Table No. 346 at 216 (1997), but civil RICO cases filed decreased from 903 cases to 840 cases each year from 1993 to 1997. *Id.* RICO claims no longer routinely appear in commercial litigation; rather, litigants now use them only in cases involving systemic patterns of unlawful conduct. In cases where others use them improperly (a substantial minority of case filings), they are quickly dismissed. The business community formerly shunned civil RICO because its use would legitimate a litigation mechanism that in the early days of its implementation was widely claimed to be illegitimate. That day is no more. *See, e.g., Anza v. Ideal Steel Supply Corp.*, No. 04-433, *cert. granted*, ___ U.S. ___, 126 S. Ct. 713 (2005) (RICO action between head-to-head competitors); Edmund L. Andres, *None Prove So Stubborn as a Giant Spurned*, N.Y. TIMES, June 11, 1997, at C37 (Volkswagen's settlement of RICO case brought by General Motors); Saul Hansell, *Bankers Trust Settles Suit With P. & G.*, N.Y. TIMES, May 10, 1996, at C1 (reporting settlement of RICO suit between corporations).

[3] Empirical studies show that it is the threat of a treble damages suit, not criminal prosecution, that is the backbone of antitrust law prohibitions. Michael Kent Block *et al.*, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose . . . a creditable threat to colluding firms

(Continued on following page)

The principal focus of this *amicus* brief is on the factual context of this case. We urge this Court not to separate its legal analysis from the demonstrable effect that illegal immigration has on our society and economy and the consonant need to energize private enforcement under RICO, as Congress specifically intended. "Consequences cannot alter statutes, but may help to fix their meaning." *In Re Rouss*, 116 N.E. 782, 785 (N.Y. 1917) (Cardozo, J.). In 1996, Congress deliberately provided for private enforcement of federal immigration statutes through RICO. While Mohawk seeks this Court's assistance in hobbling that effort, such change can (and should) only come from Congress. *See H.J., Inc.*, 492 U.S. at 249 ("[R]ewriting [RICO] . . . it is a job for Congress, if it is so inclined, and not for this Court.")

SUMMARY OF ARGUMENT

The factual context of this case is crucial. *See Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252, 1255-56 (11th Cir.) (summarizing Respondents' allegations), *cert. granted*, ___ U.S. ___, 126 S. Ct. 830 (2005). Illegal immigration affects our political system because states lose seats in the House of Representatives, and the loss of seats may affect presidential elections. Illegal immigration also affects the U.S.

. . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . "); *see also* Robert H. Lande, *The Future of Private Right of Action in Antitrust*, 16 LOY. CONSUMER L. REV. 329 (2004) (for optimal deterrence, increased level of damages is necessary); G. Robert Blakey, *Of Characterization and Other Matters: Thoughts about Multiple Damages*, 60 LAW & CONTEMP. PROBLS. 99 (1997) (analysis of history, economics, scope and rationale of treble damages).

economy. Illegal immigration is principally a matter of jobs. If employers did not hire illegal workers, illegal immigrants could not find work; if they could not find work, they would not come to this country. Illegal immigration lowers wages for our workers. Tax dollars are lost, and health, welfare and education costs are higher. Our justice system faces higher costs and law enforcement is overwhelmed. In 1996, Congress decided that private enforcement of immigration laws is needed and RICO's civil and criminal remedies were the mechanism chosen to get the job done.

Seeking to avoid liability, Mohawk asks this Court to limit "association-in-fact" RICO "enterprises" by rewriting the statutory definition to confine it to associations of "individuals." This argument, if accepted, would exclude from RICO's broad scope corporate wrongdoers that play a major role in white-collar crime. Mohawk seeks to redefine "includes," the word chosen by Congress in § 1961(4) of RICO to expand the definition of "enterprise," to mean "means." But the plain meaning of the statute clearly controls, as demonstrated by this Court's precedents and numerous circuit court cases examining the definition of "enterprise."

Alternatively, Mohawk seeks to limit "association-in-fact" RICO enterprises by excluding corporate wrongdoers that act with and through independent agents or contractors to violate U.S. immigration laws. But Mohawk's proposed construction gives an undeserved free pass to white-collar criminals by excluding from RICO's broad scope the same corporations and independent agents that recruit illegal immigrants for them, and at which Congress specifically aimed the 1996 legislation. Mohawk's requested rewriting of RICO would frustrate Congress'

specific purpose in passing the 1996 legislation and it should not be endorsed by this court.

ARGUMENT

A. The Effects of Illegal Immigration

This case is about illegal immigration, which negatively influences political, economic, tax, health, welfare, education, corrections and law enforcement in this country.

1. The Political Effect

Illegal immigration affects our nation's political processes. The U.S. population is approaching 300 million people.[4] As of March 2005, 35 million legal and illegal immigrants live in this country, giving the first half of this decade the highest five-year period of immigration in U.S. history. Nearly one-half of the post-2000 arrivals (3.7 million people) are estimated to be illegal aliens.[5] The fastest growing minority is Hispanic and our Hispanic population is now 39.9 million people.[6] This year, illegal

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[4] U.S. Census Bureau, *Hispanic and Asian Americans Increasing Faster Than Overall Population* (June 14, 2004); U.S. Census Bureau, *Population Estimates, Annual Estimates of the Population By Sex, Race and Hispanic Origin for the United States: April 1, 2000 to July 1, 2003* (2004); U.S. Census Bureau, *Annual Estimates of the Components of Population Change By Race and Hispanic or Latino Origin for the United States: July 1, 2002 to July 1, 2003* (2004).

[5] Steven A. Camarota, Center for Immigration Studies, *Immigrants at Mid-Decade* 1 (Dec. 2005).

[6] U.S. Census Bureau, *Hispanic and Asian Americans Increasing Faster Than Overall Population* (June 14, 2004).

immigration will rise to 8.5 million people, a net annual increase of 500,000 people.[7] Mexico, the largest source for unauthorized immigration, contributed over five million people to the annual illegal immigration figure, and it is the source of over 70% of our unauthorized population. California, Arizona and Texas have the highest illegal immigrant populations. More than 8% of California's population is composed of illegal immigrants while Arizona and Texas follow with 7% and 6%, respectively.[8]

Politically, illegal aliens cause states to lose seats in the U.S. House of Representatives, thereby threatening to alter the Electoral College. Indiana, Michigan and Mississippi each lost one seat in 2000, while Montana failed to gain a seat in the House that it would have had. In all, nine seats were relocated; Oklahoma, Pennsylvania, Wisconsin, Kentucky and Utah had one fewer House seat than they would have had but for illegal immigration, while California picked up six seats and New York, Texas and Florida gained the other three seats.[9]

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[7] U.S. Census Bureau, *ESCAP II: Demographic Analysis Results* (2001); Center for Immigration Studies, *Current Numbers*, available at www.cis.org/topics/currentnumbers.html (last visited Mar. 8, 2006) ("net annual increase" represents all new illegal immigration minus deaths, legalizations and out-migration of illegal immigrants).

[8] Immigration & Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* 1 (Jan. 2003); Nathan Thornburgh, *The Migrants Next Door*, TIME, Feb. 2006 32 (reporting on growth of illegal immigration from various countries; 6.3 million illegal immigrants from Mexico live in U.S., and 485,000 arrive each year, seeking to raise their average $1.86 per hour rate in Mexico to average $9 per hour in U.S.).

[9] Dudley L. Poston, Center for Immigration Studies, *Remaking the Political Landscape: The Effects of Legal and Illegal Immigration on Congressional Reapportionment* 3 (Oct. 2003).

2. The Economic and Tax Effects

Illegal immigration threatens economic effects.[10] Two issues bring immigrants to the United States: Family and jobs. Two-thirds of the legal immigrants to the U.S. are admitted because of familial relations.[11] Most illegal aliens are here seeking work. **If they could not find work, they would not come to the U.S.; if employers did not provide unlawful employment, they could not find work**. Immigrants (both legal and illegal) increase the labor supply in low-level jobs.[12] Illegal immigrants concentrate in New York, Los Angeles and Chicago, which account for 34.5% of our immigrant population. The volume of goods and services exchanged across the country creates pressure toward the equalization of the price of labor.[13] Significantly, 75% of illegal aliens lack a high school degree.[14]

In 1997, the National Research Council concluded that immigration (both legal and illegal) had significant negative effects on the wages of high school dropouts. The

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[10] This Court has previously recognized the economic effects of illegal immigration. *See DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976) ("illegal aliens . . . [taking] substandard . . . wages . . . can seriously depress wage scales . . . [for] citizens and legally admitted aliens").

[11] Immigration & Naturalization Service, *The Triennial Comprehensive Report on Immigration* 12 (2002).

[12] Steven A. Camarota, Center for Immigration Studies, *The Effects of Immigration on American Workers: Testimony Prepared for the House Judiciary Committee Subcommittee on Immigration and Claims* 1 (Oct. 28, 2003).

[13] George J. Borjas, *Increasing the Supply of Labor Through Immigration: Measuring the Influences on Native-born Workers* 2 (May 2004).

[14] Camarota, *supra* note 12, at 11.

income of those who lack a high school degree (11 million of which are native-born) was reduced by up to $13 billion a year. That figure is equal to the government's combined annual expenditures on subsidized school lunches, low-income energy assistance, and the Women, Infants, and Children Program.[15] The influx of immigration also affects wages on the top of the wage scale. In 2000, the typical native-born man without a high school diploma earned $25,000 per year and his reduction was $1,800; the typical male college graduate earned $73,000 per year and his reduction was $2,600.[16] Taxes are also higher. In 2003, the National Research Council estimated that for immigrant households the fiscal cost (tax payments minus service use) could be as high as $22 billion.[17] If 27% of immigration into the U.S. is illegal, this places the economic burden at $5.9 billion. Surveys indicate that up to one-half of employers do not deduct taxes from illegal workers' wages. Typically, undocumented workers receive a tax-free wage that is 20-30% lower than the prevailing wage rate; thus, employers illegally gain profits of at least 17% of the illegal alien's wage.[18]

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[15] National Research Council, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* 7 (James P. Smith & Barry Edmonston, eds., 1997).

[16] Borjas, *supra* note 13, at 8.

[17] Camarota, *supra* note 12, at 1.

[18] Donald L. Huddle, *Immigration and Jobs: The Process of Displacement* 6 (May 1995). Huddle also documents networks of recruiters that link U.S. jobs and Mexican villages – the very organizations this case concerns. *Id.* at 9.

3. The Health, Welfare and Education Effects

The health, welfare and educational costs of illegal immigrant populations are a growing part of public expenditures. The proportion of immigrant-headed households using at least one major welfare program is 29%, compared to 18% for native-born households.[19] Less than one-half of all employed illegal aliens are covered by medical insurance or worker's compensation insurance.[20] If they are injured, they are replaced, and they usually do not receive their last paycheck.[21] Medicaid provides health care coverage for everyone, including illegal aliens, in emergency care facilities. A study of ten states reveals that more than $2 billion was spent in 2002 for emergency Medicaid expenditures; five of the ten states studied reported data indicating at least one-half of the emergency expenditures were for illegal aliens. The Balanced Budget Act of 1997 made money available for distribution to states with the highest number of illegal aliens; in six states, the money was entirely used to replace moneys already spent on undocumented aliens for emergency care services.[22] During the 1995 debates on the Immigration Reform Act, Congressman Solomon told the House of Representatives that Governor Wilson of California had reported to him that two-thirds of the babies born in Los Angeles County hospitals are born to parents who illegally

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[19] Camarota, *supra* note 12, at 1.

[20] Huddle, *supra* note 18, at 6.

[21] *Id.; see also Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2005) (analysis of illegal immigrants and their right to collect tort damages).

[22] General Accounting Office, *Undocumented Aliens: Questions Persist About Their Effects On Hospitals' Uncompensated Care Costs* 9-10, 14 (May 2004).

entered the United States. 141 Cong. Rec. H1586 (1995) (statement of Rep. Solomon).

In fiscal year 1995, $1.1 billion in Aid to Families with Dependent Children (AFDC) and food stamps were provided to households with an illegal alien parent as head of household. Eighty-five percent of these AFDC households were located in California, New York, Texas and Arizona.[23] Any child, regardless of immigration status, is eligible for free primary and secondary education. *Plyler v. Doe*, 457 U.S. 202 (1982). As of 2000, immigrants (both legal and illegal) made up 20% of the 55 million students in the public schools, from kindergarten to twelfth grade, and 1.1 million school-age illegal immigrants reside in the U.S.[24] The annual cost of admitting these illegal immigrants to primary and secondary schools is $7.6 billion.[25]

4. The Corrections Effects

Immigration (both legal and illegal) imposes substantial costs on U.S. corrections systems. The federal inmate population is now at 188,591.[26] The annual cost of incarcerating a

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[23] General Accounting Office, *Illegal Aliens: Extent of Welfare Benefits Received on Behalf of the U.S. Citizen Children* 6, 8 (Nov. 1998).

[24] U.S. Census Bureau, *Current Population Survey 2000*; *see also* Michael E. Fix & Jeffrey S. Passel, *U.S. Immigration: Trends and Implications for Schools* 16 (Urban Inst. 2003).

[25] In 1999-2000, the annual average cost per student was $6,911. Dep't of Education, National Center for Educational Statistics, *Current Expenditures Per Pupil In Fall Enrollment In Public Elementary And Secondary Schools By State: 1969-70 to 1999-2000*.

[26] Dep't of Justice, Federal Bureau of Prisons, *Weekly Population Report*, available at www.bop.gov/locations/weekly_report.jsp (last visited Mar. 8, 2006).

federal inmate in 2005 was $23,267.[27] Twenty-seven percent of the federal prison population is aliens.[28] Thus, last year incarcerated aliens cost the federal corrections system $11-12 million each year; however, less than 9% of our sizeable prison population is in federal prisons.[29] The Urban Institute's 1994 study estimated that 21,395 illegal aliens were incarcerated in California, New York, Florida, Texas, Illinois, New Jersey and Arizona.[30] California was saddled with an annual cost of $368 million to incarcerate 15,000 illegal aliens.[31] According to Congressman Foley, on any given day Florida has 5,504 criminal aliens in state corrections facilities, costing taxpayers more than $14,000 per inmate per year. 114 Cong. Rec. H1595 (1995) (statement of Rep. Foley). During the 1995 House debates, Congressman Packard reported that criminal aliens cost state and county criminal justice systems more than $500 million per year, annual costs, he thought, "We cannot sustain." 114 Cong. Rec. 1590 (1995) (statement of Rep. Packard).

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5. Law Enforcement Effects

Lawful and unlawful immigration is beyond the control of the Immigration & Nationalization Service

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[27] 70 Fed. Reg. No. 212 (Nov. 3, 2005).

[28] General Accounting Office, *State and Federal Prisoners, Profiles of Inmate Characteristics in 1991 and 1997* 27 (May 20, 2000).

[29] *Id.* at 8. The states operate more than 1,000 facilities, as compared to the federal government's 100 facilities. *Id.*

[30] Rebecca L. Clark *et al.*, *Fiscal Effects of Undocumented Aliens: Selected Estimates for Seven States* 8-13 (Urban Inst. 1994).

[31] *Id.*; *see also* General Accounting Office, *Illegal Aliens: Assessing Estimates of Financial Burden on California* 6 (Nov. 1994).

(INS).[32] A measure of the immigration phenomenon is the experience of the Department of Justice (DOJ) following the terrorist attacks on September 11, 2001. The DOJ sought to interview 4,112 aliens who might have the ability to help the investigation. By February 2002, 45% of these aliens could not be located because the INS lacked reliable addresses. Similarly, in January 2002, the DOJ established the Absconder Apprehension Initiative and it examined 314,000 aliens with orders of removal. The INS identified 5,046 aliens who were from countries with an al Qaeda presence. As of June 24, 2002, neither the INS nor the Federal Bureau of Investigation (FBI) was able to locate 86% of the absconders.[33]

The Immigration Reform and Control Act of 1986, 100 Stat. 3359 (1986), made it illegal for an employer to hire an illegal alien, but circumvention of the statute is easy. INS data reveals that from October 1996 to May 1998, the INS identified 50,000 unauthorized aliens who had used 78,000 fraudulent documents to obtain employment. The INS has too many responsibilities and, since 1994, it has devoted just 2% of its resources to worksite enforcement; even this was before September 11, 2001. In fiscal year 1998, the INS completed 6,500 employer investigations, or just 3% of the country's employers of illegal aliens. Eighty-three percent of the INS investigations resulted in no employer sanctions, and the agency instituted criminal

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[32] As of March 1, 2003, the INS was transferred to the Department of Homeland Security. For convenience, this Brief uses the older usage.

[33] General Accounting Office, *Homeland Security: INS Cannot Locate Many Aliens Because It Lacks Reliable Address Information* 3, 13 (Nov. 2003).

proceedings in just 2% of those investigations.[34] Illegal workers' use of fraudulent documentation makes it difficult to prove the employer's knowledge.[35] The INS was able to collect about one-half of the criminal penalties it assessed, principally due to employer bankruptcy.[36] In short, the U.S. Government, acting through the INS, with its efforts supplemented by the FBI, cannot do the job of curtailing illegal immigration, much less meet its other responsibilities resulting from the events of September 11, 2001.

Given these statistics and trends, it is understandable that in 1996 Congress turned to RICO's private enforcement mechanism to combat illegal immigration. Such "private ... litigation is one of the surest weapons for effective enforcement" of the law, *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965) (antitrust), and it "provide[s] a significant supplement to the limited resources available to the government." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (antitrust); *accord Sedima*, 473 U.S. at 493 ("Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps") (citing *Reiter*).

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[34] General Accounting Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist* 5, 10, 13 (April 1999).

[35] General Accounting Office, *Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System* (July 1999).

[36] GAO, *supra* note 34, at 15; *see also* Eduardo Porter, *The Search for Illegal Immigrants Stops at the Workplace*, N.Y. TIMES, Mar. 5, 2006, at BU-3 (Bureau of Immigration & Customs Enforcement, devotes about 4% of its personnel to workplace enforcement, down from 9% in 1999; in 1992, nearly 1,500 warnings of impending fines were issued to employers of illegal immigrants but that number had dwindled to just **three** warnings in 2004).

B. Legal Analysis

1. Membership in "Association-in-Fact" RICO Enterprises and Corporations

Section 1961(4) of RICO defines "enterprise" to "**include**[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that "association-in-fact" enterprises include individuals associated together solely for illicit purposes, and emphasized that "[t]here is no restriction upon the associations embraced by" the statutory definition. *Id.* at 580. In this case, consistent with § 1961(4)'s broad definition of "enterprise," Respondents alleged that the RICO enterprise was an association-in-fact "between Mohawk and third-party recruiters," and that the members of this enterprise "share the common purpose of obtaining illegal workers for employment by Mohawk." 411 F.3d at 1258. After carefully analyzing the allegations, the Eleventh Circuit held that Respondents properly alleged an "association-in-fact" enterprise and that Mohawk participated in its operation or management, in violation of § 1962(c). *Id.* at 1257-60. Before this Court, Mohawk seeks to limit "association-in-fact" enterprises to the facts of *Turkette*, and it asks for immunity for wide swaths of white-collar criminal activity by limiting RICO's scope to "organized crime." Mohawk advances revolutionary arguments that do violence to

RICO's plain meaning and are inconsistent with the statutory language and this Court's precedents.[37]

Reading RICO is basically a question of the "language of the statute" – what this Court termed "the most reliable evidence of its intent." *Turkette*, 452 U.S. at 593.[38] This Court's principles are summarized in G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernest & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AMER. CRIM. L. REV. 1345, 1460-61 n.441 (1996), and they are consistent. So, too, are this Court's RICO decisions since 1996: *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999); *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S.

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[37] A principal use of RICO by the Government is to prosecute political corruption cases where the enterprise is usually defined as the governmental agency, political office, and the like. *See* Blakey & Perry, *Myths*, 43 VAND. L. REV. at 1020 (reporting that the largest category of RICO prosecutions involved political corruption). Another commentary, G. Robert Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 298-99 (1982) ("Blakey, *Civil RICO Action*"), collects illustrative decisions. That important role for RICO would end if this Court were to accept Mohawk's attempts to narrow the broad definition of "enterprise" it embraced in *Turkette*.

[38] *See* Henry Friendly, BENCHMARKS 202 (1976) ("(1) read the statute, (2) read the statute, (3) read the statute") (quoting Justice Frankfurter's three rules for interpreting statutes); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration."); III Roscoe Pound, JURISPRUDENCE 488-90 (1959) ("specious construction [of statutes] tends to bring law into disrespect; . . . subjects courts to political pressures; [and] invites an arbitrary personal element in judicial administration; [it threatens to make] laws . . . worth little [and to] break down [the] legal order").

158 (2001); and *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

Mohawk offers no reason to abandon these principles, and their meaning is unequivocal. As the court below observed, 411 F.3d at 1257, the definition of "enterprise" is ostensive or partially denotative; it is not connotative; its list of examples is illustrative, not exhaustive. *See Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934).[39] Of the ten definitions listed in § 1961 of RICO, four utilize "includes" while six use "means."[40] **"That the draftsman**

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[39] In *Helvering*, 293 U.S. at 125 n.1, this Court stated that the terms "means" and "includes" are not necessarily synonymous, and the distinction in their use is aptly pointed out in RICO: "[One section] . . . gives general definitions of ten terms; of these, three are stated to 'include' designated particular instances, the other seven are stated to 'mean' the definitions subsequently given. [Another section] . . . , in addition to the definitions contained in [in the other section,] . . . gives four of which two use the verb 'include' and two the verb 'means.' That the draftsman used these words in a different sense seems clear. The natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Accord Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *see also* Reed Dickerson, THE FUNDAMENTALS OF LEGAL DRAFTING, § 7.2 at 99-100 (1965) (distinguishing between connotative definitions that are exhaustive – either "is" or "means" – and denotative definitions that may be exhaustive – "means" – or partial, such as "includes").

[40] For example, § 1961(3) of RICO defines "person" to "include[ ] any individual or entity capable of holding a legal or beneficial interest in property." Beyond human beings and corporations, how far does this meaning extend? For example, under admiralty law a ship does not "own" property; it is property, but it is also a "person" for purposes of liability. II Thomas A. Russell, ed., BENEDICT ON ADMIRALTY § 21, at 2-1-2-2 (7th ed. 2005) ("A ship is, of necessity, a wanderer. She visits shores where her owners are neither know[n] nor are accessible. . . . The ship is so much an independent enterprise, a juridical aggregate of right and liabilities [that creditors contract or tort may sue her *en rem* rather

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used these words in a different sense seems clear." *Helvering*, 293 U.S. at 125 n.1 (emphasis added). RICO's plain meaning controls. *Turkette*, 452 U.S. at 580, 593; *United States v. Russello*, 464 U.S. 16, 20 (1983). If similar language reflects similar meaning, *Reves v. Ernest & Young*, 507 U.S. 170, 177 (1993), then, *a fortiori*, different language reflects different meaning, and this is precisely how the circuit courts read § 1961(4). *See, e.g., United States v. Huber*, 603 F.2d 387, 393-95 (2nd Cir. 1979) (rejecting argument that "group of corporations cannot be an enterprise" as stemming from "overly rigid reading of the definitions contained in" § 1961), *cert. denied*, 445 U.S. 927 (1980). *Accord United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (analyzing language used in § 1961(4) and holding that "two or more legal entities **can** form or be part of an association-in-fact RICO enterprise"; collecting cases reaching same result) (emphasis in original), *cert. denied*, 517 U.S. 1155 (1996); *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (affirming criminal RICO conviction; enterprise was "informal consortium" of a law firm and two police departments with three individuals who were named as defendants).

Given RICO's language and these precedents, the court below properly refused to dismiss Respondents' allegation that Mohawk and the third-party recruiters, as "distinct [corporate] entities," formed an association-in-fact RICO enterprise. 411 F.3d at 1258. The contrary result sought by Mohawk would cripple the Government's

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than her owners.]") (*citing United States v. The Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844) (Story, J.) ("The vessel which commits the aggression [of piracy] is treated as the offender" and it is subject to forfeiture *in rem* without regard to the innocence of the owners).

(and fraud victims') ability to prosecute complex, multi-party RICO cases. But Mohawk asserts that in some contexts "includes" means "means" and that § 1964 of RICO uses "includes, but not limited to" twice, arguing that Congress used "includes" to mean "means" in § 1961, and that when it meant "including, but not limited to," it knew how to say it. Mohawk ignores the careful alternative uses of "includes" and "means" in § 1961 and, had one meaning been intended, one usage would have been adopted. The "short answer [to Mohawk's arguments] is that Congress did not write the statute that way." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (citation omitted); *see also Sedima*, 473 U.S. at 489 n.8 ("minor departure in wording . . . [does not] indicate a fundamental departure in meaning."); *Scheidler v. National Organization for Women, Inc.*, ___ U.S. ___, 2006 WL 461512, *8-9 (Feb. 28, 2006).

Mohawk also takes the use of "including, but not limited to" in § 1964 out of its precise context that fixes its meaning. *See M'Culloch v. State*, 17 U.S. (4 Wheat.) 316, 415 (1819) ("The word, then, like others, is used in various senses; and, in its construction, the subject, the **context**, the intention of the person using them, are all to be taken into view.") (emphasis added); *Perine v. Chesapeake & Del. Canal Co.*, 50 U.S. (9 How.) 172, 189 (1850) (same); *see also Dolan v. U.S. Postal Svc.*, ___ U.S. ___, 2006 WL 397935, at *3 (Feb. 22, 2006). Congress's use of "includes" and "means" in § 1961 occurs in the context of a section of definitions that are separate and apart from § 1964. Section 1964 is an independent provision authorizing civil relief and it contains no definition section. The parts that use "including, but not limited to" are not parts of a definition but, rather, a series of illustrations as to the

scope of the equity power granted to the courts. Out of an abundance of caution, Congress used the phrase so that courts would know that the list was "not exhaustive." S. Rep. No. 91-617, 91st Cong., 1st Sess. 160 (1969); 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan). Mohawk's arguments as to the meaning and scope of § 1961(4)'s definition of "enterprise" are contrary to this Court's analysis and holding in *Turkette*, 452 U.S. at 580, and numerous circuit court decisions. *See London*, 66 F.3d at 1243 (collecting cases).

2. Membership in "Association-in-Fact" RICO Enterprises and Corporations and Agents

In *Cedric Kushner Promotions*, 533 U.S. at 161-62, this Court held that for purposes of § 1962(c), the "person" named as the liable "defendant" cannot simultaneously play the role of "enterprise." But in seeking to extend this rule to cover the facts of this case, Mohawk seeks immunity for wide swathes of white-collar crime, not by limiting RICO to organized crime (thereby indirectly excluding white-collar crime), but by directly excluding from RICO a substantial portion of white-collar crime.

Application of RICO's "enterprise" concept to so-called "legitimate" entities presents few problems. *See United States v. Beasley*, 72 F.3d 1518, 1525 (11th Cir.) ("A variety of entities can be enterprises, including benevolent and nonprofit organizations such as unions and benefit funds, governmental units, courts and judicial offices, police departments, and motorcycle clubs to name a few."), *cert. denied*, 519 U.S. 866 (1996). But the definition of "enterprise" also includes an "association-in-fact," which this Court defined to mean "a group of persons associated

together for a **common purpose** of engaging in a course of conduct." *Turkette*, 452 U.S. at 583 (emphasis added). The court below held that "common purpose" had been satisfied because "each member of the enterprise is allegedly reaping a large economic benefit from Mohawk's employment of illegal workers." 411 F.3d at 1258. The Eleventh Circuit squared its holding with criminal RICO precedents, *id.* at 1258-60, and civil RICO decisions from the Second, Sixth and Ninth Circuits. *Id.* at 1259. The court below disagreed with *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 543 U.S. 956 (2004), upon which Mohawk relies. *Compare* 411 F.3d at 1259-60 (discussing *Baker*) *with* Pet. Br. at 34, 37.

To analyze associations-in-fact, a discussion of how the circuit courts treat the "common purpose" element is helpful. The issue is sometimes confused when the focus shifts between wholly illicit enterprises (as in *Turkette*) and other types of enterprises that may be basically lawful but are perverted by a subset of their members for illicit purposes, as in *Beasley*, 72 F.3d at 1525-26 (corruption of a religion), or where the enterprise is composed of witting and unwitting members, as in *Aetna Cas. & Sur. Co. v. P&B Autobody*, 43 F.3d 1546 (1st Cir. 1996), involving a false insurance claims scheme. Some courts have little difficulty in analyzing an enterprise that is (or includes) among its members an innocent "instrument" or "victim" of the racketeering activity. *See, e.g., DeFalco v. Bernas*, 244 F.3d 286, 309 (2nd Cir.) (town government was RICO enterprise run by corrupt officials; enterprise is often "passive instrument or victim") (citations omitted), *cert. denied*, 534 U.S. 891 (2001). Other circuits struggle with the "common purpose" element in this situation. *See, e.g., United States v. Cianci*, 378 F.3d 71, 83 (1st Cir. 2004). In

such cases, the difficulty arises from the unexamined assumption that the enterprise and its various members can only play the role of "perpetrator"; that is, they must be "guilty." However, while the enterprise is the center or organizing principal of RICO litigation, it is not the defendant; thus, it need not be "guilty." In fact, an association-in-fact enterprise may contain opposing factions, as in *United States v. Orena*, 32 F.3d 704, 710 (2nd Cir. 1994), which held that an internal war in the Columbo organized crime "family" (the RICO enterprise) did not negate a finding of a "common purpose."

Proper application of the "common purpose" element varies with different fact patterns. Nevertheless, better-reasoned cases hold that an association-in-fact RICO enterprise need not reflect a "common purpose" apart from engaging in racketeering. *See, e.g., United States v. Rogers*, 89 F.3d 1326, 1336 (7th Cir.), *cert. denied*, 519 U.S. 999 (1996):

> [T]he enterprise [need not] . . . have a purpose separate and apart from the pattern of racketeering activity. The [contrary] position is simply insupportable. . . . [I]t would be nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity. We know from *Turkette* that 'enterprise' includes illegal organizations, or illegal associations-in-fact, that have an exclusively criminal purpose.

Accord Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 786-87 (9th Cir. 1996); *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 770 (8th Cir. 1992).

Most courts recognize that the personal goals of individual members of an association-in-fact enterprise

need not be congruent with the enterprise's "common purpose." Thus, in *Beasley*, 72 F.3d at 1525-26 & n.7, not all members of the religion shared the goals of a murderous subset of its members. *See also United States v. Griffin*, 660 F.2d 966, 1000 (4th Cir. 1981) ("[W]hatver **private** purposes there may have been there was also the requisite commonality of purpose between the defendants to give form to the associational enterprise charged.") (emphasis added). Something as general as "monetary profit" suffices to satisfy "common purpose." *See London*, 66 F.3d at 1244. Thus, if this Court accepts Mohawk's argument as to "common purpose" and follows the Seventh Circuit's analysis in *Baker*, 357 F.3d at 691, there is a severe risk that RICO's salutary use in prosecuting organized crime "families" will be endangered. *See* Note, *Qua Vadis, Association In Fact? The Growing Disparity Between How Federal Courts Interpret RICO's Enterprise Provision in Criminal and Civil Cases*, 80 NOTRE DAME L. REV. 781, 822-23 (2005).[41]

Members of an association-in-fact are distinct from the enterprise itself; thus, they are subject to being sued for RICO violations without violating the person/enterprise

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[41] Under the *Baker* court's analysis, because all members of all organizations may have divergent individual goals, no association-in-fact RICO enterprises could ever exist. The Seventh Circuit's analysis is not only out of step with the other circuits, but it also represents bad organization theory. *See* Edward Gross & Amitai Etzonini, ORGANIZATIONS IN SOCIETY 8-13 (1985) ("But whose image of the . . . [of the goals counts?] That of top executives? The board of directors or trustees? The majority of its members? [N]one of these. The organizational goal is . . . [the goal] the organization as a **collectivity** is trying to bring about. . . . Sometimes it is determined through peaceful consultation, at other times . . . [by] a power play . . . among . . . cabals . . . and 'personalities.' ") (emphasis added).

distinction. *See, e.g., Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989):

> collective entity is something more than the members of which it is comprised. If five persons form an association in fact and engage in a pattern of racketeering activity such as drug smuggling and murder, an individual member could never be prosecuted for violating RICO under the appellants' reasoning because he or she would not be considered distinct from the enterprise. We do not believe that Congress envisioned that this type of conduct would be insulated from RICO prosecutions.

Accord London, 66 F.3d at 1243-44; *United States v. Feldman*, 853 F.2d 648, 655-60 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989).

Shortly after the lower courts' recognition of the person/enterprise distinction rule, some litigants sought to circumvent it by alleging "association-in-fact" enterprises composed of a corporation, its officers and employees. Reasoning that this "entity" was only the corporation by another name, courts refused to recognize it as being distinct from the corporation itself. *See, e.g., Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 583 (5th Cir. 1992). But Mohawk seeks to extend this "corporation-as-officers-and-employees" rule to immunize from RICO liability those cases in which wrongdoer corporations use independent "contractors" or "agents" to violate the law. This is a bridge too far.

We urge this Court to follow the common sense analysis employed in *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1277 (11th Cir.), *cert. denied*, 531 U.S. 1015 (2000), a decision rendered not on the face of a complaint, but after a jury verdict in a criminal RICO case. In *Goldin*,

which Mohawk ignores even though it was cited by the court below, 411 F.3d at 1257-58, the Eleventh Circuit carefully analyzed the Second Circuit's decisions in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2nd Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998), and *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2nd Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996).[42] *Discon* properly refused to recognize as distinct an association-in-fact enterprise composed of three corporations because even though they were separate legal entities, they operated "within the scope of a single corporate structure, guided by a single corporate consciousness." 93 F.3d at 1064. On the other hand, *Securitron Magnalock* sustained as distinct an association-in-fact enterprise "where it was an active, operating, ongoing business, each with a presence in the marketplace 'rather than two stacks of papers.'" *Goldin*, 219 F.3d at 1277 (quoting *Securitron*, 65 F.3d at 263). Thus, a group of related corporations could form a distinct association-in-fact enterprise where each "is a separate ongoing business with a separate customer base . . . [if] [e]ach is free to act independently and advance its own interests contrary to the those of the other . . . corporations." *Id.* In short, dependent agents, no; independent agents, yes.

Mohawk and its *amici* attack this distinction, arguing that it places in jeopardy the way U.S. corporations outsource their business now that we have crossed the bridge to the 21st Century. But corporations that do

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[42] *Accord Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 361-62 (9th Cir. 2005) (corporation, its independent lawyers and expert witnesses may make up distinct RICO enterprise; "Just as corporate officer can be a person distinct from the corporate enterprise, DuPont is separate from its legal defense team. . . . Indeed, the rule of professional conduct requires law firms to be distinct entities and to maintain their professional independence.") (citations omitted).

business in-house and out-of-house are not in danger of criminal or civil RICO liability because of the way in which they configure their business, or how the Government, or a private plaintiff, might allege that the configuration equals an association-in-fact enterprise. The "enterprise" itself is neither legal nor illegal; it is neutral, as it should be, unless and until the group engages in a pattern of racketeering activity, which is criminal in any case. Reconfiguring association-in-fact enterprises will not exculpate corporations of their criminal violations of the predicate acts.

The Eleventh Circuit's common sense analysis in this case, 411 F.3d at 1257-60, and in *Goldin*, 219 F.3d at 1277 is, however, inconsistent with Seventh Circuit decisions. In *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923 (7th Cir. 2003), Chief Judge Posner, relying on his own prior opinions, chiefly *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-28 (7th Cir. 1997) (holding that "family" of corporations, even though independent, may not constitute enterprise distinct from members), held that an enterprise was not properly alleged where it consisted of a parent corporation and a subsidiary: "A parent and its wholly owned subsidiaries no more have sufficient distinctness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act, unless the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity, which has not been shown here." 329 F.3d at 928 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984)).

This analysis is problematic. First, although of secondary importance (except to illustrate Chief Judge Posner's fidelity to precedent), the Seventh Circuit had already held that *Copperweld*, an antitrust case, was not applicable to RICO. *See Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271,

1281 (7th Cir. 1989). Second, and of signal importance, Chief Judge Posner's reasoning is inconsistent with *Cedric Kushner*, 533 U.S. at 166. Chief Judge Posner was not entitled to ignore this Court's precedent, "unless we wish anarchy to prevail." *Hutto v. Davis*, 454 U.S. 370, 375 (1985). Third, in *Fitzgerald*, 116 F.3d at 226-28, the decision on which Chief Judge Posner principally relied, he offered a test ("family resemblance") that is indeterminate, even though, in other contexts, he is critical of reasoning by analogy. Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 90 (1990) (arguing that it suffers by comparison with logical deduction, scientific deduction and *stare decisis*).

Fourth, as the Court below recognized, 411 F.3d at 1259-60, the Seventh Circuit's approach to association-in-fact enterprises excludes from RICO, as Mohawk would, wide swathes of white-collar crime. This is contrary to RICO's express language and congressional intent. RICO applies to "any person," 18 U.S.C. § 1961(3), and it is not limited to the infiltration of legitimate business by organized crime, or to attacking only criminal gangs. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994) ("The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.") (citations omitted). Although in *Fitzgerald*, 116 F.3d at 226-28, the Seventh Circuit asserted a contrary position, namely, that courts should read RICO narrowly in light of its so-called "prototypical application," Chief Judge Posner's reasoning contradicts *H.J., Inc.*, 492 U.S. at 248, which made clear that "Congress drafted RICO broadly enough

to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators."

The Seventh Circuit's position on association-in-fact enterprises is inconsistent with other well-reasoned circuit court precedents. The Third Circuit abandoned a similar narrow focus in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 262-69 (3rd Cir. 1995), holding that officers and directors were distinct from a corporation that constituted the RICO enterprise.

Finally, we do not offer RICO as a panacea for the issues presented by the epidemic of illegal immigration. Of far greater significance would be the adoption of a fair "guest worker" program, as proposed by the Bush Administration, the U.S. Chamber of Congress and the Service Employees International Union.

CONCLUSION

For these reasons, NASCAT respectfully urges this Court to reject the arguments of Petitioner and its amici and to affirm the decision of the Eleventh Circuit in this case.

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MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, Individually and on behalf of a class,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether a defendant corporation and its agents can constitute an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of a larger enterprise in addition to its own affairs.

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INTRODUCTION

Mohawk Industries, Inc.'s opening brief asks this Court to legislate amendments to the federal RICO statute[1] to (1) exclude corporations from association-in-fact enterprises and (2) immunize corporations from liability for conducting the affairs of such enterprises. In support, Mohawk repeatedly argues that Congress cannot possibly have intended to subject corporations engaged in "routine business activity" to RICO liability and that the Eleventh Circuit's opinion will cast open the floodgates of litigation against "legitimate businesses" like Mohawk.

These arguments should have a familiar ring because this Court has had repeated occasion to consider proposals to artificially restrict RICO to avoid the purportedly dire consequences of the statute's broad reach. The Court, however, has properly declined previous invitations to rewrite the RICO statute in the guise of interpretation. Although the Court has twice observed that Congress could narrow the statute's exceptionally broad reach, the legislature instead has expanded RICO by adding predicate acts, including the illegal hiring and harboring crimes at issue here. Nevertheless, the number of civil RICO actions filed in the federal district courts has declined substantially.[2] Indeed, the recent statistics indicate that only one civil RICO case is filed per district judge per

---

[1] The Racketeer Influenced and Corrupt Organizations Act, Pub. L. 91-452, Title IX, 84 Stat. 941, at 18 U.S.C. §§ 1961-1968 ("RICO").

[2] *See* Federal Judicial Caseload Statistics, Table 2.2 (Civil Cases Filed By Nature of Suit, Fiscal Years 1988-2004) (972 RICO cases filed in FY 1990 compared to 743 filed in FY 2003 and 777 filed in FY 2004), *available at* http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf.

year.[3] Mohawk's brief, therefore, asks this Court to exceed its constitutional role, ignore Congress's decision to add an illegal hiring predicate to RICO and contradict its own precedents – all to fix a problem that does not exist.

Nor does the Eleventh Circuit's decision criminalize "ordinary business activity," as Mohawk and its *amici* repeatedly claim. Whether criminal or civil, a RICO claim requires an allegation that the defendant engaged in a pattern of serious criminal misconduct. Respondents here allege that Mohawk – in connection with other, distinct third parties – has engaged in widespread violations of the immigration laws for profit. In 1996, Congress enacted statutes that (1) criminalized the employment of undocumented aliens and (2) added illegal hiring to the list of predicate crimes subject to RICO prosecution and treble damage actions. These legislative decisions conclusively demonstrate that Congress intended to permit prosecutors and plaintiffs to use RICO to combat the illegal conduct alleged in the complaint. By arguing that "legitimate" corporations should not face RICO prosecution for hiring undocumented aliens, even when they associate with others in the manner that RICO proscribes, Mohawk asks this Court for nothing less than a judicial veto of these statutes.

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[3] *Compare id. with* Federal Court Management Statistics, District Courts (2005) (U.S. District Court Judicial Caseload Profile) (listing between 650 and 680 district judges from 2000 to 2005), *available at* http://www.uscourts.gov/cgi-bin/cmsd2005.pl.

STATEMENT OF THE CASE

On January 6, 2004, respondents filed their complaint in the U.S. District Court for the Northern District of Georgia, alleging that Mohawk has violated the RICO statute.[4] Mohawk is the second largest carpet and rug manufacturer in the United States.[5] It employs more than 30,000 workers and owns or leases at least twenty-six facilities in Georgia; in 2002, Mohawk's net carpet and rug sales were in excess of $3 billion.[6]

Respondents are current and former hourly Mohawk employees who allege Mohawk depressed their wages by illegally employing and harboring large numbers of undocumented workers in its carpet factories. While employed at Mohawk, they came to believe that Mohawk had hired thousands of aliens who were not entitled to work or reside in the United States. Respondents allege that Mohawk repeatedly "recycled" illegal workers by allowing them to work under a series of different identities.[7] Mohawk employees and other recruiters have transported illegal aliens from the Texas-Mexico border to northwest Georgia, where they provided them with access to housing, false documents and employment.[8] Mohawk's supervisors have said that they prefer undocumented aliens to U.S. citizens and other legal workers because illegal workers do not complain about working conditions.[9]

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[4] *See, e.g.*, JA 7 (Compl. ¶ 1).

[5] *Id.* at 8 (Compl. ¶ 2).

[6] *Id.* (Compl. ¶ 2).

[7] *Id.* at 10-12 (Compl. ¶¶ 17-19, 25-26).

[8] *Id.* at 11-12 (Compl. ¶¶ 22-23).

[9] *Id.* at 13 (Compl. ¶ 31).

When law enforcement personnel have raided Mohawk's facilities, illegal workers have fled or attempted to hide to evade arrest.[10] Furthermore, Mohawk has taken steps to conceal this criminal conduct by destroying eligibility documents and helping illegal workers evade law enforcement personnel.[11] Accordingly, respondents allege that Mohawk has committed hundreds, if not thousands, of felonies over several years.[12]

Respondents do not allege that Mohawk committed this conduct alone. Rather, they allege that Mohawk participated in the affairs of an association-in-fact RICO enterprise that includes independent temporary employment agencies, such as Temporary Placement Services, Inc. ("TPS"), and other individual recruiters who are not Mohawk employees.[13] Respondents allege that Mohawk conducts the affairs of this separate enterprise by (1) using the services of the enterprise to procure illegal workers, whom Mohawk unlawfully hires and harbors; (2) using the enterprise to "borrow" additional illegal workers, employed by other members of the enterprise; (3) relying on the other members of the enterprise to provide its illegal workers with housing and false documents;

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[10] *Id.* at 12-13 (Compl. ¶ 27).

[11] *Id.* at 11, 13 (Compl. ¶¶ 20, 28).

[12] Specifically, respondents allege that Mohawk has violated § 274 of the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* ("INA"), by (1) knowingly employing undocumented workers in violation of 8 U.S.C. § 1324(a)(3); (2) harboring illegal aliens in violation of § 1324(a)(1)(A)(iii); and (3) encouraging illegal aliens to enter the United States in violation of § 1324(a)(1)(A)(iv). *See* JA 19-20 (Compl. ¶¶ 58-61).

[13] *Id.* at 23 (Compl. ¶ 76).

and (4) knowingly accepting false documentation provided by other members of the enterprise.[14]

On February 9, 2004, Mohawk moved to dismiss the complaint. In a thorough 53-page opinion, the district court denied Mohawk's motion to dismiss the respondents' federal RICO claim on April 12, 2004.[15] The district court subsequently granted Mohawk's petition for leave to seek an interlocutory appeal and stayed all further proceedings pending that appeal.[16]

The Eleventh Circuit accepted Mohawk's interlocutory appeal and affirmed the district court's decision to uphold respondents' RICO claim.[17] The Eleventh Circuit subsequently denied Mohawk's petition for rehearing *en banc*,[18] but the district court continued its stay pending this Court's review.[19] As a result, the parties have taken no discovery and made no progress towards class certification.

SUMMARY OF THE ARGUMENT

The thrust of Mohawk's argument is that Congress cannot have intended RICO to apply to corporations hiring their own employees, regardless of whether the defendant corporation violates the immigration laws or whether the defendant corporation associates with distinct third parties and entities to commit those crimes. These arguments

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[14] *Id.* at 22-23 (Compl. ¶¶ 75-76).

[15] *See* Pet. App. 61a.

[16] *Id.* at 68a-72a.

[17] *Id.* at 67a; *id.* at 1a-23a.

[18] *Id.* at 73a.

[19] *Id.* at 62a-66a.

simply ignore Congress's 1996 decision to add the illegal hiring of undocumented aliens to the list of predicate crimes that may be prosecuted under RICO. That decision confirms that Congress believed that employers could commit illegal hiring through a distinct RICO enterprise and intended prosecutors and civil plaintiffs to use RICO against corporations that did so.

After obtaining *certiorari* for this Court to review whether a defendant corporation can form an association-in-fact enterprise with its agents, Mohawk's opening brief all but abandons that question. Instead, Mohawk asks the Court to hold that corporations can never be part of an association-in-fact enterprise. That argument has been rejected by every circuit to consider it, and Mohawk affirmatively conceded it in the lower courts.

Mohawk's second argument similarly ignores the agency issue posed in the Question Presented and petitions the Court to limit association-in-fact enterprises to "combination[s] . . . with an existence and activities that are clearly distinct" from its member entities.[20] This new rule has no grounding in the text of the RICO statute or the case law that interprets it. In fact, Mohawk's rule contradicts this Court's seminal precedents in *United States v. Turkette*, *Reves v. Ernst & Young*, and *Cedric Kushner Promotions, Inc. v. King*, and it would require the lower courts to re-examine RICO principles that have been settled for decades. More important, Mohawk's immodest proposal would effectively eliminate association-in-fact enterprises and all 18 U.S.C. § 1962(c) actions by allowing any RICO defendant to escape criminal or civil liability by

[20] Mhk Br. at 27 & n.15.

arguing that it had merely conducted its own affairs rather than the affairs of a larger enterprise. That is not the law, nor should it be.

ARGUMENT

I. Congress Intended Lawsuits Like This One to Enforce the Immigration Laws.

Mohawk argues that Congress cannot possibly have intended to subject "legitimate" corporations conducting their own affairs, "legal ***or otherwise***," to suits like this one.[21] To that end, Mohawk cites selectively from RICO's legislative history and emphasizes that Congress was primarily concerned with individual criminals infiltrating legitimate businesses. But nothing in the legislative history of RICO or the broader Organized Crime Control Act of 1970 ("OCCA"),[22] supports Mohawk's claim that Congress intended corporations engaged in racketeering to be immune from RICO prosecution. And this Court has long recognized that Congress enacted a statute that extends beyond the infiltration concerns that Mohawk emphasizes.[23] Moreover, Mohawk simply ignores subsequent legislative developments that confirm Congress affirmatively intended to impose RICO liability on corporations that associate with others to employ undocumented aliens.

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[21] *Id.* at 37-38 (emphasis added).

[22] Pub. L. No. 91-452, 84 Stat. 941.

[23] *See, e.g., United States v. Turkette*, 452 U.S. 576, 590 (1981) ("we are unpersuaded that Congress . . . confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, only the infiltration of legitimate business").

A. By Making Illegal Hiring of Undocumented Aliens a RICO Predicate Offense, Congress Intended Corporations To Face Suits Like This One.

Since at least 1885, Congress has passed immigration laws "aimed at the practice of certain employers importing cheap labor from abroad."[24] In 1986, Congress passed the Immigration Reform and Control Act ("IRCA"), which for the first time imposed civil and criminal penalties on the corporations that employ undocumented aliens.[25] Congress realized that most illegal immigration has been motivated by the pursuit of higher paying jobs and sought to "end[] the magnet that lures [illegal aliens] into this country"[26] and "remov[e] the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of labor."[27] To this end, IRCA specifically amended the INA to eliminate the "Texas

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[24] H.R. Rep. No. 82-1365, at 10 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1662 (discussing the Alien Contract Labor Laws). *See DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976) (illegal aliens can seriously depress wage scales for legal workers); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984) (same discussing the INA); *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) ("IRCA forcefully made combatting the employment of illegal aliens central to the policy of immigration law") (internal quotations omitted).

[25] *See* IRCA, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3360, *codified at* 8 U.S.C. § 1324a.

[26] H.R. Rep. No. 99-682(I), at 45-46 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5649-50. *See also NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2d Cir. 1997) (IRCA combats illegal employment by targeting employers).

[27] H.R. Rep. No. 99-682(I), at 52 (1986), *as reprinted in* 1986 U.S.C.C.A.N. at 5656. *See generally* Memorandum of the President, 60 Fed. Reg. 7885, 7886 (Feb. 7, 1995) ("Employers who hire illegal immigrants ... suppress[] wages and working conditions for our country's legal workers").

proviso," which protected employers from prosecution for harboring undocumented aliens.[28]

Ten years later, the 104th Congress amended the INA again to impose more stringent criminal penalties for knowingly employing undocumented aliens.[29] With this law, Congress intended to further deter employers from hiring undocumented aliens: "It has been recognized for many years that the primary magnet for most illegal immigrants is the availability of jobs – jobs that pay much better than what is available in their home countries."[30] Later that year, the very same 104th Congress added violations of § 274 of the INA, including the illegal hiring, harboring and encouraging crimes alleged here, to the definition of "racketeering activity" at 18 U.S.C. § 1961(1)(F).[31]

Congress is presumed to know the law, and by the time it added these RICO predicates in September 1996, two things were plain. First, Congress was aware that the federal courts had interpreted the broad language of RICO to apply beyond the bounds of "traditional" organized crime and the Mafia's infiltration of legitimate business.[32] Rather than amend the statute to reverse course, Congress has confirmed its expansive intentions for RICO by adding to

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[28] *See* IRCA, Pub. L. No. 99-603, § 112(a), 100 Stat. 3360. For the exclusion of employment activity before this amendment, *see* 8 U.S.C.A. § 1324, 1986 amendments, subsection a.

[29] *See* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 203, Pub. L. No. 104-208, Division C, 110 Stat. 3009-546 (Sept. 30, 1996).

[30] S. Rep. No. 104-249, at 4 (1996).

[31] *See* The Antiterrorism and Effective Death Penalty Act, § 433, Pub. L. No. 104-132, 110 Stat. 1274 (1996).

[32] *See, e.g., Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985).

the statute's predicate acts.[33] Second, Congress knew that corporations and other employers were subject to criminal prosecution for hiring undocumented workers and harboring illegal aliens in violation of the INA because it had added new criminal penalties against employers that employed large numbers of undocumented workers earlier in that year. Accordingly, the 104th Congress well knew that its addition of the INA predicates to the RICO statute would open employers – and corporations like Mohawk – to prosecution and civil suits under RICO. Indeed, by singling out ***only*** those INA violations committed for financial gain for inclusion in § 1961(1)(F), Congress specifically targeted employers for civil and criminal RICO liability. Recognizing this clear purpose, four circuits have held that similar RICO cases against corporations that associate with others to employ and harbor undocumented workers state valid claims that must be decided on the merits: "[T]he fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one."[34]

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[33] *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677, 702 (1979) (Congressional inaction after judicial interpretation of a statute indicates the legislature's agreement or acquiescence in that interpretation); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (noting Congress's failure to further define RICO's pattern requirement after *Sedima*). By contrast, when Congress believes a correction to the statute is necessary, it has demonstrated its ability to narrow RICO. *See* Private Securities Litigation Reform Act, Pub. L. 104-67, § 107, 109 Stat. 737, 758 (Dec. 22, 1995) (amending 18 U.S.C. § 1964(c) to provide "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of RICO").

[34] *Mendoza v. Zirkle*, 301 F.3d 1163 (9th Cir. 2002). *See also Trollinger v. Tyson Foods*, 370 F.3d 602 (6th Cir. 2004); *Williams v.*

(Continued on following page)

B. Mohawk's Arguments Would Nullify Congress's Addition of INA Violations to RICO's Predicate Crimes.

Mohawk attempts to side-step Congress's decision to impose RICO liability on the employers of undocumented aliens by arguing that corporations cannot commit this conduct through the affairs of a distinct RICO enterprise because hiring is a "quintessential corporate function."[35] Even if the defendant corporation commits this crime in association with third parties, Mohawk argues that the employer is immune from RICO because these activities are merely the employer's activities. If Mohawk were correct on this point, however, no employer of illegal workers could ever face RICO prosecution and the addition of an illegal hiring predicate to the RICO statute would serve no purpose. Moreover, because the enterprise questions at issue here are the same for criminal and civil RICO cases,[36] Mohawk's approach would hamstring federal prosecutors as well as civil plaintiffs. Respectfully, these pleas for an amendment or a veto to the statute Congress has passed are directed to the wrong branch of government.[37]

Mohawk Industries, Inc., 411 F.3d 1252 (11th Cir. 2005); *Commercial Cleaning Services, LLC v. Colin Service Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001).

[35] *See* Mhk Br. at 34.

[36] *See, e.g.*, Pet. App. 4a ("These requirements apply whether the RICO claim is civil or criminal in nature.").

[37] *See Sedima*, 473 U.S. at 499-500 (rejecting attempt to impose artificial restrictions on RICO in response to the statute's use against corporations as well as mobsters).

II. An Association-in-Fact Enterprise May Be Comprised of Corporations and Other Entities.

Part I of Mohawk's brief concerns the new and incorrect assertion that a corporation (and any other entity) cannot be a member of an association-in-fact enterprise.

A. Mohawk Failed to Preserve its Initial Argument.

Normally, this Court will not consider arguments that the petitioner failed to preserve in the lower courts and omitted from the petition for *certiorari*.[38] Indeed, the Court has refused to consider unpreserved arguments in at least two prior RICO cases.[39] In this case, Mohawk failed to preserve what has become its primary argument before either the district court or the Eleventh Circuit. Indeed, Mohawk previously conceded that a corporation *could be* a member of an association-in-fact enterprise under § 1961(4). Mohawk informed the district court that: "Specifically, ***Mohawk***

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[38] *See* Sup. Ct. R. 14(1)(a) ("[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"); *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002) (the Court will not decide cases on grounds that are not raised in the petition for certiorari); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 392 n.7 (1996). *See also* Sup. Ct. R. 24(1)(a) (a party's brief "may not raise additional questions or change the substance of the questions already presented" in the petition for certiorari); *Taylor v. Feeland & Kronz*, 503 U.S. 638, 645-646 (1992) (same).

[39] *See NOW v. Scheidler*, 510 U.S. 249, 262 (1994) (refusing to consider a constitutional challenge to RICO that the defendant had failed to raise below); *Am. Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 608 (1985) (refusing to consider unpreserved argument that the plaintiff's complaint failed to allege a violation of 18 U.S.C. § 1962(c)).

agrees that a corporation can be both a RICO person and ***part of an association-in-fact enterprise***[.]"[40] And Mohawk subsequently informed the Eleventh Circuit that current law permits an allegation of an association-in-fact enterprise that includes the defendant corporation:

> This [plaintiffs' theory] would be a substantial departure from ***current law, which requires that to sufficiently allege a RICO enterprise, a plaintiff must allege that the enterprise is comprised of a corporation*** and a separate, independent third party.[41]

In addition, Mohawk's argument does not fairly fall within the question presented in Mohawk's petition for *certiorari*. There, Mohawk argued that the circuit courts are split on the question of whether a corporation and its third party agents can form such an association-in-fact enterprise.[42] Mohawk's petition contains no hint of the additional argument that corporations can never be members of such an enterprise. And because virtually every court to consider Mohawk's proposed construction of 18 U.S.C. § 1961(4) has rejected it as "nonsense,"[43] it is unlikely that the question would have merited this Court's attention

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[40] Mhk Dist. Ct. Reply Br. at 5 (emphasis added) [Dist. Ct. Dkt. 43].

[41] Mhk's 11th Cir. Br. at 12-13 (emphasis added) (filed Sept. 7, 2004). *See also* Mhk's 11th Cir. Reply Brief at 11 n.8 (filed Nov. 5, 2004) ("Indeed, nothing in Mohawk's rule would affect the RICO liability of a corporation that truly participates in some larger association of corporations or (non-agent) individuals by engaging in racketeering activities on the enterprise's behalf.").

[42] *See* Pet. 10-18.

[43] *See, e.g., United States v. Huber*, 603 F.2d 387, 388-89 (2d Cir. 1979); *United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (noting that every circuit to address the argument that an association-in-fact enterprise is limited to individuals has rejected it).

standing alone. The Court, therefore, should enforce its rules that prohibit the parties from adding to the Question Presented by declining to reach Mohawk's first argument.

B. The RICO Statute Contemplates Association-in-Fact Enterprises that Include Corporations and Other Entities.

Mohawk's contention that a corporation cannot form part of an association in fact enterprise fares no better on the merits because it requires the conclusion that Congress intended § 1961(4) to constitute an exclusive listing of every enterprise actionable under RICO. That interpretation contradicts the statute's plain language, which disclaims any such limited reading by providing that an enterprise "includes" the referenced persons and entities *and* "***any*** union or group of individuals associated in fact." Mohawk's restrictive reading of § 1961(4) also contradicts the Court's observation that Congress employed "enterprise" as a term of breadth,[44] and *Turkette*'s holding that "[t]here is no restriction upon the associations embraced by the definition" of an enterprise.[45] Finally, Mohawk's view conflicts with this Court's general recognition that "RICO is to be read broadly" in light of "Congress' self-consciously expansive language and overall approach."[46]

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[44] *See United States v. Russello*, 464 U.S. 16, 21-22 (1983) (among the "terms and concepts of breadth" Congress employed in the RICO statute "are 'enterprise' in § 1961(4) . . . and 'participate' in § 1962(c)").

[45] *See Turkette*, 452 U.S. at 580.

[46] *Sedima*, 473 U.S. 497-98.

1. The Circuit Courts Have Unanimously Rejected Mohawk's Argument that a Corporation Cannot Be a Member of An Association-in-Fact Enterprise Because § 1961(4) Is Illustrative, Not Exhaustive

Although Mohawk's argument that a corporation cannot form any part of an association-in-fact enterprise is new to this case, it is hardly novel to the federal courts. RICO defendants have repeatedly made the same argument to the district and circuit courts, which have almost universally rejected it because it contradicts the plain language of the statute and would lead to absurd results. The Second Circuit dispatched Mohawk's argument more than twenty-five years ago because it "makes nonsense of the statute."[47] More than a decade later, the Seventh Circuit similarly rejected the argument because it "would make no sense."[48] By 1995, the First Circuit could observe that the contention that "an association-in-fact RICO enterprise . . . must be an association of individuals, and cannot include legal entities" had been "addressed to a number of circuit courts, and each has rejected it."[49] Indeed, despite the more than 35 years RICO and § 1961(4) have been on the books, Mohawk is unable to cite a single case that adopts its conclusion that corporations cannot join an association-in-fact enterprise.

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[47] *Huber*, 603 F.2d at 388-89.

[48] *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991).

[49] *London*, 66 F.3d at 1243-44 (citing extensive authority). *See also United States v. Console*, 13 F.3d 641, 652 (3d Cir. 1993); *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *United States v. Perholtz*, 842 F.2d 343, 352-53 (D.C. Cir. 1998); *Masters*, 924 F.2d at 1366; *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1982).

2. The Statute Precludes Mohawk's Inference that Congress Excluded Corporations and Other Entities From Association-In-Fact Enterprises.

The reason the circuit courts have universally rejected Mohawk's argument springs from the plain language of the statute. Congress defined the concept of a RICO enterprise at 18 U.S.C. § 1961(4), with broad language: "an 'enterprise' includes . . . any union or group of individuals associated in fact although not a legal entity." The task of interpreting this definition begins and ends with this language itself, for where, as here, the statute is plain, "the sole function of the courts is to enforce it according to its terms."[50] In fact, this Court has already held that there can be "no uncertainty" attributed to the very language that Mohawk has put at issue.[51] Because § 1961(4) contains no ambiguity, the Court should enforce Congress's plain directive and avoid the absurd implications of Mohawk's construction.

a. *Expressio Unius* Cannot Be Applied to § 1961(4).

Mohawk argues that Congress's inclusion of certain types of persons and entities in the definition of enterprise at § 1961(4) necessarily excludes any other form of enterprise, invoking the doctrine of *expressio unius est exclusio alterius*.[52] *Turkette* rejected the application of a similar doctrine to

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[50] *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

[51] *Turkette*, 452 U.S. at 581 & 587 n.10 (refusing to apply the rule of lenity and other aids to construction in interpreting § 1961(4)); *Scheidler*, 510 U.S. at 262 (same). *See also Reves v. Ernst & Young*, 507 U.S. 170, 184 n.8 (1993) (same for § 1962(c)).

[52] *See* Mhk Br. at 12-15.

§ 1961(4) because it could discern no "uncertainty in the meaning to be attributed to the phrase 'any union or group of individuals associated in fact[.]'"[53] Moreover, as this Court has observed, "the rule [of *expressio unius*] is fine when it applies," but in other cases, "it just fails to work." *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80, 84 (2002).

In *Echazabal*, the unanimous Court refused to apply *expressio unius* to a federal statute that provided certain types of qualification standards "may include" an identified requirement.[54] The Court refused to exclude other requirements because "the expansive phrasing of 'may include' points directly away from the sort of exclusive specification" that would support the inference. Like the provision at issue in *Echazabal*, § 1961(4)'s definition of enterprise employs the same expansive language to negate the exclusion Mohawk would imply here.

Furthermore, § 1961(4) does not constitute the type of comprehensive listing that would support the inference, of intentional exclusion by omission.[55] Before making that inference, this Court has required that the statute at issue include the essential ingredient of a "series of two or more terms or things that should be understood to go hand in

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[53] *Turkette*, 452 U.S. at 581 (rejecting the application of *ejusdem generis* because that "comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute").

[54] *See Echazabal*, 536 U.S. at 80.

[55] *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; ***it has force only*** when the items expressed are members of an 'associated group or series,' ***justifying the inference that items not mentioned were excluded by deliberate choice***, not inadvertence.") (emphasis added).

hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."[56] Section 1961(4) does not fit this bill.

Mohawk concedes that § 1961(4) does not provide a single list of entities that would imply the exclusion of corporations.[57] Rather, as this Court held in *Turkette*, the statute identifies "two categories of associations that come within the purview of the 'enterprise' definition."[58] The first category encompasses "legal entities," and the second encompasses any additional associations that do not form a legal entity. This second "catch all" category contains no "specific enumeration" of all the associations included in the statute.[59] Rather than attempting to list the numerous combinations of persons and entities that conceivably could associate, § 1961(4)'s second clause simply says that ***any*** union or group associated in fact will do.[60] Compared even against the far more detailed enumeration of persons and entities in § 1961(4)'s first clause, there can be no serious argument that the second clause constitutes a series of terms from which the omission of corporations (or any other legal entity) is so striking that it necessarily bespeaks a considered and advertent omission.[61] And because Mohawk's

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[56] *Echazabal*, 536 U.S. at 81, *quoted in Barnhart*, 537 U.S. at 168.

[57] *See* Mhk. Br. at 16.

[58] 452 U.S. 576, 581-82.

[59] *Id.*

[60] *See Masters*, 924 F.2d at 1366 ("The point of the definition is to make clear that it need not be a formal enterprise; 'associated in fact' will do.").

[61] *See Echazabal*, 536 U.S. at 81; *Barnhart*, 537 U.S. at 168. The general language in § 1961(4)'s second clause distinguishes the far narrower language considered in *Willheim v. Murchison*, 342 F.2d 33, 36 (2d Cir. 1965), and explains the absence of an additional phrase analogous to the "any . . . other legal entity" that appears in § 1961(4)'s first clause.

interpretation of the statute would lead to absurd and obviously unintended results,[62] all three of the *Echazabal* strikes against an inference of exclusion are present here.

Mohawk's argument further ignores the presence of the "any union" language in § 1964(1). By its plain and ordinary meaning, a "union" refers to "something formed by a combining or coalition of parts or members . . . a confederation of independent individuals (as nations or persons) for some common purpose."[63] That concept is certainly broad enough to encompass an association comprised of corporations and others, particularly when read in context: "[A]ny union . . . associated in fact."[64] Accordingly, even if the Court were to rewrite § 1961(4)'s phrase "any . . . group of individuals associated in fact" to read "any . . . group of natural persons," as Mohawk advocates,[65] that would not imply that corporations cannot form association-in-fact enterprises.

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[62] *See infra* Part I.

[63] *See* Merriam-Webster's Collegiate Dictionary 1292 (10th ed. 1999).

[64] That Congress did not intend to limit this reference to labor unions is clear from the term's exclusion from the list of legal entities that can constitute enterprises in § 1961(4)'s first clause. *See Turkette*, 452 U.S. at 582. Furthermore, Congress cannot have intended "any union . . . of individuals" because that would render (1) the term "union" redundant and (b) the term "group" superfluous.

[65] Mohawk concedes there is ample authority for reading individuals to encompass corporations. *See* Mhk. Br. at 13 n.5. To argue that the term captures only natural persons in this context, however, Mohawk emphasizes that (1) statutory language should be afforded its plain meaning; (2) statutes should be construed to avoid rendering language superfluous; (3) terms should have the same, consistent meaning throughout a statute; and (4) Congress's juxtaposition of different language in successive statutory sections indicates a deliberate choice. *Id.* at 12-15. But Mohawk would have the Court abandon all these canons of construction when it considers the natural implication of

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b. Mohawk's Interpretation Improperly Negates The Distinction Between "Includes" and "Means" in RICO's Definition Section.

The statute's structure reinforces the conclusion that § 1961(4) does not imply the exclusion of corporations from association-in-fact enterprises. Section 1961 contains ten separate definitions. Five of those definitions begin with the term "means,"[66] while another four, including the definition of enterprise, use the more open-ended term "includes."[67] This different terminology is critical because this Court has recognized that when Congress begins a definition with "means" it intends a comprehensive definition that excludes any meaning left unstated.[68] By contrast, where Congress begins a definition with "includes" the Court has read that language to indicate an exemplary definition that "comprehends or embraces" additional meanings that may not be stated explicitly.[69] Moreover, where Congress employs both

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Congress's decision to use "includes" rather than "means" in § 1961(4). This inconsistency reveals that the desired result, rather than any principled interpretation of the statute, directs Mohawk's analysis.

[66] *See, e.g.*, 18 U.S.C. § 1961 (1, 2, 6, 7 & 8).

[67] *See, e.g.*, 18 U.S.C. § 1961 (3, 4, 9 & 10). The final subsection, § 1961(5), which provides that a pattern of racketeering activity "requires at least two acts of racketeering activity," is a limitation, not a definition. *See H.J., Inc.*, 492 U.S. at 237.

[68] *See Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1979) (distinguishing between use of "means" and "includes" in a definition); *Groman v. Commissioner*, 302 U.S. 82, 86 (1937) ("This conclusion is fortified by the fact that when an exclusive definition is intended the word 'means' is employed . . . whereas here the word used is 'includes.'").

[69] *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 (1934). *See also* 2A Norman J. Singer, *Sutherland's Statutes and Statutory Construction* § 47.7 (6th ed. 2005) ("A term whose statutory definition declares what

(Continued on following page)

"means" and "includes" in the same statute, this Court has concluded that the drafters made an advertent choice to distinguish between comprehensive and illustrative definitions.[70]

As a result, when Congress uses both "means" and "includes" in the same statute, as it did in § 1961 and throughout the OCCA,[71] that language cannot be read as synonymous and any definitions that begin with "includes" must be read as exemplary rather than comprehensive.[72] That implication is particularly strong here, because previous versions of the bills that eventually became RICO employed only "means" in their definitional sections. When Congress added the provision that eventually became § 1961, and first defined "enterprise," however, it began to use "includes" as well as "means" to indicate where it intended a

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it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means' ").

[70] *Helvering*, 293 U.S at 126 n.1 ("That the draftsman used these words in a different sense seems clear. The natural distinction would be that where 'means' is employed the term and its definition are to be interchangeable equivalents, and that ***the verb 'includes' imports a general class***, some of whose particular instances are those specified in the definition.") (emphasis added). *Accord Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.") (citations omitted).

[71] The OCCA's other provisions further indicate that Congress's use of "means" and "includes" was advertent. Thus, in Title II, Congress used both "means" and "includes," *see* 18 U.S.C. § 6001 (using "means" in subsections (1), (3), and (4), and "includes" in subsection (2)). By contrast, Title I uses "includes," *see* 18 U.S.C. § 3333(f), and Title XI used "means" exclusively. *See* 18 U.S.C. § 841.

[72] *Cf. Sedima*, 473 U.S. at 497 n.14 (fact that Congress used the different formulation of "requires" in § 1961(1)(5) precluded argument that a pattern "means" two acts of racketeering activity).

broader definition.[73] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."[74]

Section 1961(4), therefore, is an exemplary definition, and every circuit court to consider Mohawk's contrary argument has rejected it.[75] Mohawk's suggestion that the Court construed this provision to provide a comprehensive list of enterprises in *NOW v. Scheidler*, 510 U.S. 249 (1994) is not correct. Regardless of what the parties may have argued, *Scheidler* reaffirmed *Turkette*'s observation that § 1964(1) is a broad provision without any "restriction on the associations embraced by the definition."[76]

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[73] Senate Bill 1861, which defined the term "enterprise" for the first time, represented the combination of Senator McClellan's S. 2187 and Senator Hruska's S. 1623. *See* G. Robert Blakey and Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young, 33 Am. Crim. L. Rev. 1369, 1666-68 (1996) (describing this progression). Both S. 1623 and S. 2187 employed "means" as the exclusive introduction to their defined terms. *See* S. 1623 § 2, 91st Cong. (1969); S. 2187 § 3, 89th Cong. (1965). When those bills were combined into S. 1861, however, Congress began to use both "means" and "includes" in its definitions, including the definition of enterprise that was enacted at § 1961(4). *See also* H.R. 10312, 91st Cong. (1969) (same language in Rep. Poff's House bill).

[74] *Russello*, 464 U.S. at 23-24.

[75] *See, e.g.*, *United States v. Cianci*, 378 F.3d 71, 79 (1st Cir. 2004), *cert. denied*, 126 S. Ct. 421 (2005) ("The term's flexibility is denoted by the use of the word 'includes' rather than 'means' or 'is limited to'; it does not purport to be exhaustive."). *See supra* note 50.

[76] *Scheidler*, 510 U.S. at 260.

3. RICO's Legislative History Does Not Contradict § 1961(4)'s Plain Language.

Mohawk invites the Court to supplant this clear statutory language by citing selected portions of the legislative history. This Court, however, "start[s] with the assumption that legislative purpose is expressed by the ordinary meaning of the words used."[77] After all, "it is the statute, and not the Committee Report, which is the authoritative expression of the law."[78] Extrinsic materials, including legislative history, "have a role in statutory interpretation ***only*** to the extent they shed a reliable light on the enacting Legislature's understanding of ***otherwise ambiguous terms***."[79] Indeed, it would work a "radical abandonment" of precedent to resort to legislative history absent a compelling need to interpret ambiguous statutory text.[80]

In *Turkette*, this Court concluded that there was no such ambiguity in § 1961(4).[81] Indeed, *Turkette* declined to impose an artificially narrow construction on that provision based on the same arguments about RICO's legislative

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[77] *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

[78] *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994).

[79] *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, 2626 (2005) (emphasis added).

[80] *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187 n.8 (2004) (plurality opinion) (quoting Chief Justice Marshall's opinion in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 399 (1805)). *Accord Exxon*, 125 S. Ct. at 2626.

[81] *See Turkette*, 452 U.S. at 587 n.10 ("There being no ambiguity in the RICO provisions [§§ 1961(4) and 1962(c)], the rule of lenity does not come into play.").

history that Mohawk recycles here.[82] The Court should similarly decline Mohawk's invitation to use selected legislative history to re-write RICO's broad language.

Furthermore, this Court has repeatedly recognized that Congress enacted a statute that far surpasses the activities of traditional organized crime or the infiltration of legitimate business.[83] By the same token, the fact that Congress was greatly concerned with the exploits of individual criminals does not compel the conclusion that only individuals may be constituent members of an enterprise. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provision of our laws rather than the principal concerns of our legislators by which we are governed."[84]

Nor is Mohawk correct to suggest that Congress only considered corporations as potential victims of racketeering activity. If that were true, Congress would not have included "entities," including corporations, within the definition of "persons" subject to RICO prosecution.[85] In any event, the OCCA's legislative history confirms that Congress was concerned about corporations that perpetrated crimes. In fact, Congress heard testimony from the U.S. Chamber of

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[82] *Id.* at 584-93.

[83] *See H.J., Inc.*, 492 U.S. at 248 ("The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."); *Scheidler*, 510 U.S. at 260 (same).

[84] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). *See also City of Chicago*, 511 U.S. at 339 ("It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text.").

[85] *See* 18 U.S.C. § 1961(3).

Commerce that honest business men faced unfair competition from "***so-called legitimate businesses*** [that] have been able to secure tax advantages, avoidance of zoning and building regulations, of health standards, etc."[86]

Finally, Mohawk claims that a judicial amendment to § 1961(4) is necessary to avoid difficult (albeit different) problems purportedly caused by Congress's imprecise language and this Court's decision in *Turkette*. The circuit courts, however, have had no difficulty rejecting the suggestion that § 1961(4) limits association-in-fact enterprises to groups of natural persons; on that point, they are unanimous.[87] In fact, the circuits consistently have held that corporations and other entities can join with (1) natural persons[88] and (2) other corporations and entities to form association-in-fact enterprises.[89] Mohawk's unsupported assertion that the courts have had more difficulty with the proof required to establish the structure and common

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[86] *See, e.g.*, Supplemental Statement of Aaron M. Kohn, Managing Director, Metropolitan Crime Commission of New Orleans, Inc., Member, Advisory Panel on Crime Prevention and Control of the U.S. Chamber of Commerce, Organized Crime Control: Hearings on S.30 before Subcommittee No. 5 of the Committee of the Judiciary, 91st Cong. 112, at 433 (1970).

[87] *See supra* Part II (A) & note 50.

[88] *See, e.g., United States v. Goldin Indus., Inc.*, 219 F.3d 1271 (11th Cir. 2001); *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263-64 (2d Cir. 1995); *Libertad v. Welch*, 53 F.3d 428, 443-44 (1st Cir. 1995); *United States v. Hughes*, 895 F.2d 1135, 1142 (6th Cir. 1990); *United States v. Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988); *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983); *Thevis*, 665 F.2d at 625 (5th Cir. 1982).

[89] *See, e.g., London*, 66 F.3d at 1243-44; *Console*, 13 F.3d at 650-51; *Dana Corp. v. Blue Cross & Blue Shield*, 900 F.2d 882, 887 (6th Cir. 1990); *Atlas Pile Driving*, 886 F.2d at 995; *United States v. Porcelli*, 865 F.2d 1352, 1363-64 (2d Cir. 1989); *Huber*, 603 F.2d at 393-94.

purpose required to establish an enterprise is no reason to categorically exclude corporations and other entities from the statute.[90]

III. Mohawk's Vague Test For Measuring Distinctness Contradicts the Statute and Would Eliminate Association-in-Fact Enterprises.

Like Part I, Part II of Mohawk's brief abandons the specific question on which this Court granted *certiorari*. Having recognized that (1) the complaint does not allege a principal-agent relationship between Mohawk and any of the third party recruiters that constitute the enterprise, and (2) *Kushner* requires nothing more than legal distinctness between the defendant and the RICO enterprise, Mohawk has changed its argument. Rather than continue to argue that agency negates the formation of an enterprise, Mohawk now argues that as long as a defendant corporation is performing its business activities, it cannot – ***as a matter of law*** – participate in the affairs of a broader RICO enterprise, ***even if the defendant corporation conducts those activities by associating with third parties to engage in a pattern of racketeering activity***. That is not the law, and if it were, no corporation (or arguably any other defendant) could be prosecuted as a member of an association-in-fact enterprise because the defendant would simply recharacterize the alleged conduct as its own business affairs.

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[90] *See, e.g., Sedima*, 473 U.S. at 491 (even the imposition of significant logistical difficulties will not justify the "invention of a requirement that cannot be found in the [RICO] statute and that Congress . . . did not envision").

The only apparent utility of the new test Mohawk proposes is to excuse corporations from RICO liability. Mohawk's proposal is not derived from the statutory text, the legislative history or the precedent of this or any other court. Moreover, the inherent vagueness of a test that turns on the defendant's definition of its own affairs precludes Mohawk from articulating a specific rule that the lower courts could apply in a principled way. What reason could a corporation (or any other defendant) have for joining an association-in-fact enterprise other than to further its own affairs and interests? This Court has rejected previous attempts to invent and impose vague restrictions on the RICO statute,[91] and it should do so again here.

Whether under the guise of its previous agency argument or the new test proposed in its opening brief, Mohawk urges this Court to transform RICO from a statute of exceptional breadth to one with a "razor thin zone of application" that is entirely inconsistent with the broad language Congress employed and the liberal construction it demanded for this statute.[92] Respondents will first address the agency question presented on *certiorari*, before turning to the untenable new approach Mohawk urges on this Court.

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[91] *See H.J., Inc.*, 492 U.S. at 243-49 (rejecting arguments for an amorphous organized crime limitation on RICO); *Sedima*, 473 U.S. at 493-94 (rejecting a "racketeering injury" requirement for RICO civil actions because it was impossible to define and apply).

[92] *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267-68 (3d Cir. 1995) (*citing Sedima*, 473 U.S. at 497-98).

A. Mohawk Cannot Escape RICO Liability By Inventing Agency Relationships Among the Members of the Enterprise.

The question that this Court agreed to review is whether a "defendant corporation and its agents" can form a RICO enterprise that is separate from the defendant corporation. The answer to that question is "yes" because this Court has unanimously held that the statute requires nothing more than legal separateness between the RICO person and the enterprise. That holding applies to both "legitimate enterprises" made up of corporations and their business allies and "illegitimate enterprises" made up of individual criminals because RICO's enterprise and participation requirements are the same for criminal and civil cases.[93]

Mohawk has argued that agency relationships among the members of an enterprise should defeat distinctness. That argument fails because neither the statute, nor this Court's interpretation of it in *Kushner*, makes any reference to the concept of agency. The statute requires only that the defendant associate with the other members of the enterprise and participate in the conduct of its affairs,[94] and that is what the complaint alleges. By contrast, the complaint makes no allegation of agency among the members of the enterprise.

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[93] *See* Pet. App. 4a; *Cf. H.J., Inc.*, 492 U.S. at 232-33 (pattern requirement applies in both civil and criminal cases).

[94] *See* § 1961(4) (demanding an association-in-fact); § 1962(c) (requiring that the RICO defendant be "associated with" the enterprise and "conduct or participate in the conduct of" its affairs).

1. *Kushner* Requires Nothing More Than Legal Distinctness Between the RICO Person and the Enterprise.

In *Kushner*, the unanimous Court read § 1962(c) to "suggest" a need to plead and prove two distinct entities: (1) a RICO person (or defendant) and (2) a RICO enterprise "that is not simply the same 'person' referred to by a different name."[95] But the same unanimous Court also concluded that a formal legal distinction between the person and the enterprise satisfied that requirement:

> The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. ***And we can find nothing in the statute that requires any more "separateness" than that.***[96]

Accordingly, in *Kushner*, it was enough that the defendant person was legally distinct from a corporation of which he was the sole owner, employee and president. Even though the owner/employee was clearly a corporate agent, alleged to be acting in furtherance of the corporation's interests, this Court held that the defendant and his corporation were separate enough to satisfy § 1962(c)'s implied distinctness requirement.

In *Kushner*, the corporation was the enterprise, not a member of a larger association-in-fact. But including the RICO person in a broader association-in-fact enterprise is entirely consistent with *Kushner*'s distinctness analysis because "[a] collective entity is something more than the

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[95] *See Kushner*, 533 U.S. at 161.

[96] *Id.* at 163 (emphasis added).

members of which it is comprised."[97] Accordingly, the circuit courts have had no difficulty concluding that defendant corporation can be included in a broader RICO enterprise.[98] As a result, respondents' enterprise allegations satisfy § 1962(c).

In the courts below and in its petition for *certiorari*, Mohawk argued that agency relationships among the members of an enterprise were inconsistent with § 1962(c)'s distinctness requirement. This objection will not work because even agents and principals are legally distinct.[99] Moreover, *Kushner* held that the president of a corporation "acting within the scope of his authority,"[100] was distinct from the corporation named as the enterprise, even though he was undoubtedly a corporate agent.[101] Although the Court acknowledged the "principle that a corporation acts only through its directors, officers and

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[97] *Atlas Pile Driving*, 886 F.2d at 995 (concluding that a corporation can be the RICO defendant as well as a member of a larger association-in-fact enterprise).

[98] *Goldin Indus.*, 219 F.3d at 1275 ("To find that a defendant cannot be *part* of the enterprise would undermine the purposes of the RICO statute"). *See also London*, 66 F.3d at 1243; *Atlas Pile Driving*, 886 F.2d at 995; *Feldman*, 853 F.2d at 658; *Cullen v. Margiotta*, 811 F.2d 698, 729-30 (2d Cir. 1987).

[99] Restatement (Third) of the Law of Agency § 1.01 cmt. c (Tentative Draft No. 2, Mar. 14, 2001) ("Despite their agency relationship, a principal and agent retain separate personalities"). *See also Graham v. LaCrosse M.R. Co.*, 102 U.S. 148, 161 (1880) ("A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law, it is as distinct a being as an individual"); Brief for the United States as *Amicus Curiae* in *Kushner*, 2001 WL 85159, at *19-21 (Jan. 25, 2001) ("Agency doctrines do not negate the actual distinctness of principal and agent for purposes of defining a RICO enterprise.").

[100] 533 U.S. at 160-65.

[101] *See* Restatement (Third) of the Law of Agency § 1.01 cmt. c.

agents," the Court sustained the plaintiff's enterprise allegations because a corporation and its employees and agents "are not legally identical."[102] As a result, Mohawk's now-abandoned agency argument cannot be reconciled with *Kushner*.[103]

2. Respondents Have Not Alleged That the Other Members of the Enterprise Are Mohawk's Employees, Subsidiaries or Agents.

Although *Kushner* reserved judgment on the question of whether the defendant corporation and its ***employees*** can form a distinct enterprise, the complaint here alleges an enterprise that consists of the defendant corporation and (1) separately incorporated recruiting firms and (2) persons who are not on the defendant corporation's payroll. Because this case comes to the Court on the pleadings, the record begins and ends with these allegations: "At this stage of the litigation [the Court] must accept plaintiffs' allegations as true"[104] Mohawk cannot win a motion to dismiss by demanding the Court select the least favorable of all the possible inferences.[105] Rather, respondents' RICO claim "must be

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[102] *Kushner*, 533 U.S. at 165.

[103] When Mohawk advanced its agency argument in the lower courts, it cited cases holding that corporations are not distinct from their employees or subsidiaries. *Kushner* noted these cases but declined to consider their merits. 533 U.S. at 164. Obviously, however, a corporation is not the same legal person as its employees or even its wholly-owned subsidiaries for the same reasons discussed in *Kushner*. *Id.* at 163. For more on these cases, which Mohawk now cites in support of its new test, *see infra* Part III(C)(2).

[104] *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

[105] *See Papasan v. Allain*, 478 U.S. 265, 282 (1986).

sustained if relief could be granted 'under any set of facts that could be proved consistent with the allegations.'"[106]

Mohawk's attempts to re-characterize respondents' allegations violate these standards. Respondents allege that Mohawk – in association with distinct third parties – has committed hundreds and perhaps thousands of felonies to unlawfully expand its labor pool:

> Mohawk has engaged in an open and ongoing pattern of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 during the last five years through its participation in an association-in-fact enterprise with ***third party*** employment agencies and other recruiters, including Temporary Placement Services ("TPS"), that supply Mohawk with illegal workers. Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity.[107]

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[106] *Scheidler*, 510 U.S. at 256 (*quoting Hishon*, 467 U.S. at 73).

[107] JA 23 (Compl. ¶ 76) (emphasis added).

The complaint, therefore, does not allege an enterprise that consists only of Mohawk and its employees. Nor have the respondents alleged that the enterprise consists of any Mohawk subsidiary. As a result, neither the district court nor the court of appeals had any difficulty reading respondents' pleading to allege that the recruiters and employment agencies are legally and practicably distinct from Mohawk itself.[108]

B. Mohawk's Proposed Test For Determining Whether a Defendant Has Participated in the Affairs of a Distinct Enterprise Would Eviscerate Association-in-Fact Liability.

Rather than take up these agency issues, Part II of Mohawk's brief urges the Court to restrict the definition of an association-in-fact enterprise to combinations "with an existence and activities that are clearly distinct from a member corporation."[109] Mohawk's amorphous proposal finds no footing in the RICO statute and would contradict this Court's precedents in *Reves*, *Turkette*, and *Kushner*. Moreover, the sweep of Mohawk's proposed test is breathtaking: it would immunize corporations from association-in-fact liability because the defendant corporation could always claim it was merely performing its own functions and activities. Mohawk has not identified any specific rule

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[108] *See* Pet. App. 7a-8a; *id.* at 44a-48a. Moreover, while the question of agency is heavily dependent upon the facts, *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 323, 323-24 (1992), the reported cases indicate that distinct recruiting firms typically constitute independent contractors and not agents. *See Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 933 (D.S.C. 1997); *Freedom Labor Contractors v. State Div. of Unemployment Compensation*, 779 So.2d 663, 665 (Fl. App. 2001).

[109] Mhk Br. at 27.

or principle that would allow this Court – and those that must apply its precedents – to determine the potential limits of a defendant's affairs. Accordingly, there is nothing to prevent any defendant from simply re-characterizing its racketeering activity as its own affairs.

Moreover, the position Mohawk advocates is tremendously unwise. Although Mohawk pitches its argument to benefit only legitimate corporations, Mohawk's test would benefit all RICO defendants because the statute does not distinguish between corporate and individual offenders and its distinctness and enterprise requirements apply in both criminal and civil cases. As this Court observed in *Sedima*, corporations "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."[110] Mohawk's artificial restrictions on the statute would establish a RICO safe harbor, where criminal enterprises of all stripes could hide from federal prosecutors and civil plaintiffs merely by incorporating, leading to "the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO."[111]

Mohawk's murky test cannot be reconciled with the statute and it is devoid of any working principle that litigants, lawyers or the lower courts can apply in a predictable way. This Court should reject it.[112]

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[110] 473 U.S. at 499.

[111] *London*, 66 F.3d at 1244.

[112] *See Sedima*, 473 U.S. at 493-94.

1. Mohawk's Proposal Contradicts the Purpose of the RICO Statute.

Mohawk's arguments make no sense in the context of the RICO statute's objectives. While Mohawk states its proposal in various terms, it asks the Court to limit association-in-fact enterprises "to circumstances where the 'group' has functions and activities that are distinct from those of its member entities."[113] But Congress enacted RICO to combat enterprise criminality precisely because it found the prospect of different actors teaming up to pursue criminal conduct more dangerous than individual criminals acting alone.[114] By definition, therefore, an association-in-fact enterprise consists of different actors that join their separate functions and activities "for a common purpose of engaging in a course of conduct."[115] To immunize defendants that claim they are pursuing their own affairs in addition to the conduct that violates § 1962(c), would make nonsense of the statute.[116]

For example, the association of an individual Mafia loan shark and the persons who enforce the terms of loans

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[113] Mhk Br. at 27 & n.15.

[114] *See, e.g., United States v. Elliott*, 571 F.2d 880, 905 (5th Cir. 1978) ("we recognize that collective action toward an illegal end involves a greater risk to society than individual action toward the same end"); *Ianelli v. United States*, 420 U.S. 775, 778 (1975) (same, in the OCCA context).

[115] *Turkette*, 452 U.S. at 583.

[116] Mohawk's repeated contention that this plain reading of the statute converts RICO into a general conspiracy statute is not correct. RICO liability requires more than the formation of an enterprise, it further requires allegations and proof that the defendant engaged in a pattern of specific criminal conduct and perpetrated that conduct through an enterprise. *See* 18 U.S.C. §§ 1961(1) & 1962.

by physically threatening and abusing debtors is a classic RICO association-in-fact enterprise.[117] Under Mohawk's proposed limitation, however, neither the loan shark nor the enforcers would risk RICO liability as long as they each merely perform their own respective affairs of extending credit and enforcing loan agreements. To incur RICO liability under Mohawk's test, these mobsters would have to further combine to do something so entirely different from their own "routine business affairs" that the group could be said to be engaged in "functions and activities that are distinct from the member entities." This approach would transform RICO from a statute concerned about the conduct of criminal enterprises to one principally concerned with diversification, where liability is limited to enterprises in which the members self-consciously play out of their familiar positions. Mohawk's assumption that separate actors should be permitted to profit from criminal conduct, but nevertheless avoid RICO liability as long as they do not perform additional, different functions, therefore, is at odds with the statute's primary objective.

2. Mohawk's Test For Participation in the Affairs of an Enterprise Is Fatally Inconsistent With *Reves*.

Although Mohawk supports its amorphous new test by citing *Reves v. Ernst & Young*, Mohawk does ***not*** challenge respondents' allegation that Mohawk conducted the affairs of the enterprise by simultaneously operating

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[117] *See United States v. Salerno*, 108 F.3d 730, 739 (7th Cir. 1997) (affirming RICO of defendant who participated in a loan sharking enterprise); *United States v. Shifman*, 124 F.3d 31, 35-36 (1st Cir. 1997) (same).

or managing both its own and the enterprise's affairs. Indeed, Mohawk appears to agree that it is alleged to be a ringleader in the enterprise, which answers the question actually posed in *Reves*. Instead, Mohawk argues that its extensive participation in the enterprise is not distinct from Mohawk's own affairs.

a. Because *Reves* Concerns "Outsiders," Not Members of Association-in-Fact Enterprises, It Does Not Support Mohawk's Proposed Test.

Mohawk constructs its participation argument from a single line in *Reves*, where the Court observed that § 1962(c) requires that the defendant conduct or participate in the enterprise's affairs, not ***just*** its own affairs.[118] But nothing in this sentence or the rest of the Court's opinion supports the untenable inference that a defendant's conduct of its own business precludes participation in a larger association-in-fact enterprise. The passage Mohawk cites confirms that the management test adopted in *Reves* would exclude "complete outsiders" to the enterprise. As a result, the circuit courts have read *Reves* as a case about the liability of outsiders who assist the enterprise.[119] But unlike *Reves*, where the enterprise was a single farm cooperative, to which the defendant was a complete outsider,[120] the enterprise alleged here is an

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[118] *See Reves*, 507 U.S. at 185.

[119] *See MCM Partners Inc. v. Andrews-Barlett & Assocs.*, 62 F.3d 967 (7th Cir. 1995); *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910 (8th Cir. 2001); *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001).

[120] *Reves*, 507 U.S. at 186.

association-in-fact, of which Mohawk is a member or "insider." The *Reves* Court's observation that a RICO defendant must do more than merely participate in "just its own affairs," therefore, cannot be read to immunize ***insiders*** from liability when they conduct the enterprise's affairs ***in addition to*** their own affairs.

For example, consider an enterprise made up of corporations and other persons engaged in processing scrap metal, where the defendant corporations illegally short-weigh the metal and distribute fraudulent invoices to their customers. The tasks of weighing metal, preparing invoices and mailing them to customers certainly fall within the "classic" internal corporate functions of the businesses at issue. According to Mohawk, therefore, any enterprise that includes these defendants must fail for lack of "functions and activities that are distinct from those of its member entities." But because the defendants associate with additional third parties to conduct this business through a pattern of racketeering activity – *in addition to conducting their own affairs* – the United States has secured § 1962(c) convictions on these facts.[121]

The same holds true for drug dealing enterprises. Although the various participants in such an enterprise, from the kingpin to the manufacturers to the mid-level distributors, are all engaged in their own drug dealing, there is no question that they are ***also*** conducting (or participating in the conduct of) the affairs of a larger enterprise, distinct from their own individual affairs, by engaging in those

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[121] *See Goldin Indus.*, 219 F.3d at 1271. *See also United States v. Allen*, 155 F.3d 35 (2d Cir. 1998) (government brought civil RICO complaint seeking to enjoin a short-weighing scheme).

activities.[122] Before RICO liability would attach under Mohawk's view, however, these drug dealers presumably would have to diversify their efforts into a new and different type of crime. To date, the federal courts have had no difficulty applying RICO to drug enterprises,[123] but if the Court adopted Mohawk's test and allowed RICO defendants to invoke the tautology of "their own affairs" as a defense, these and many more RICO convictions would have to be overturned.

b. Mohawk's Proposed Participation Test Would Contradict *Reves* By Allowing Upper Rung Defendants to Escape RICO Liability.

The error of Mohawk's approach is further exposed when considered against *Reves*' holding that RICO liability firmly attaches to those who conduct or direct the enterprise. To capture these defendants, *Reves* requires proof that the defendant operated or managed the enterprise's affairs. But evidence that shows the defendant played "*some* part in ***directing*** the enterprise's affairs"[124] will tend to establish that the other members of the enterprise were merely helping the defendant carry out its own affairs. Indeed, the more the other enterprise members defer to the defendant, the stronger the defendant corporation's argument that it "is simply using another organization to

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[122] *See, e.g., United States v. Posada-Rios*, 158 F.3d 832, 856 (5th Cir. 1998) (affirming RICO conviction of a drug dealer for participating in an association-in-fact drug enterprise).

[123] *Id. See also United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) (affirming RICO conviction because the government did not have to show "that [defendants] had a legitimate business with the other witnesses who also distributed cocaine on the side").

[124] *Reves*, 507 U.S. at 179 (second emphasis added).

assist the corporation in its own affairs (legal or otherwise)."[125] In the context of the drug dealing enterprise considered above, this logic would allow the kingpin to escape RICO liability by arguing that the manufacturers and distributors were merely assisting him with his own affairs. By arguing that there can be no liability when the enterprise supports the defendant's activities, Mohawk turns *Reves* on its head and its proposed approach would allow the most culpable defendants, those that *Reves* described as "upper management,"[126] to escape prosecution under § 1962(c).

Following *Reves*, all the circuits have held that a defendant that directs and delegates the conduct of its business affairs to the other members of an association-in-fact enterprise satisfies *Reves* by conducting the affairs of a distinct enterprise. For example, in *MCM Partners, Inc. v. Andrews Bartlett & Assocs., Inc.*, 62 F.3d 967, 977-78 (7th Cir. 1995), a defendant corporation that directed the other members of an association-in-fact enterprise to implement the defendant's decisions and further the defendant's objective of eliminating competition and increasing its profits satisfied the *Reves* operation and management test.[127] Respondents, therefore, satisfied

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[125] Mhk Br. at 37-38.

[126] *Reves*, 507 U.S. at 173.

[127] *Accord Abels*, 259 F.3d at 917-18 ("To direct a business's normal activities is to participate in the conduct of an enterprise within the meaning of RICO"); *Napoli v. United States*, 32 F.3d 31, 36 (2d Cir. 1994); *Smith*, 247 F.3d at 534; *United States v. Parise*, 159 F.3d 790, 797 (3d Cir. 1998); *Davis v. Mutual Life Insurance Co.*, 6 F.3d 367, 380 (6th Cir. 1993). *See also* Christopher W. Madel, *The Modern RICO Enterprise: The Inoperation and Mismanagement of* Reves v. Ernst & Young, 71 Tul. L. Rev. 1133, 1171-72 (1997) ("Because they naturally exert control and direction over an enterprise's affairs, kingpins or leaders of

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Reves by alleging Mohawk conducts the enterprise's affairs when it delegates the task of procuring, transporting, encouraging, harboring and even hiring its undocumented workers to TPS, individual recruiters and others members of the enterprise. Indeed, the complaint alleges that Mohawk borrows illegal workers actually employed by TPS and other temporary employment agencies, without ever "hiring" them.[128] When those allegations prove true, Mohawk will have violated § 1962(c) by participating in the enterprise's affairs according to the law in every circuit in the country.[129]

3. Mohawk's Suggestion that Illegal Hiring Cannot Be Conducted Through the Affairs of a Distinct Enterprise Contradicts Congress' Decision to Add Violations of the INA to the RICO Statute.

To its misreading of *Reves*, Mohawk adds the ill-conceived notion that respondents have alleged nothing more than Mohawk's conduct of it own affairs through a pattern of illegal immigration violations because "[h]iring its own employees is a classic internal function of a company."[130] The most obvious rejoinder is that Congress

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an enterprise, always satisfy the operation-or-management test's position and participation elements").

[128] *See* JA 10-12, 23 (Compl. ¶¶ 16-26, 76).

[129] *See also Scheidler*, 510 U.S. at 259 (§ 1962(c) is violated when the defendant uses the enterprise as a vehicle to commit the pattern of racketeering activity); *United States v. Starrett*, 55 F.3d 1525, 1542-43 & n.10 (11th Cir. 1995) (proof that the "facilities and services of the enterprise were regularly and repeatedly used to make possible the racketeering activity" establishes the conduct of the enterprise's affairs).

[130] Mhk Br. at 28.

clearly contemplated RICO prosecutions for illegal hiring when it added violations of the INA to the RICO statute in 1996. Accordingly, Congress – if not Mohawk and its *amici* – plainly believed that an employer could commit that conduct through the affairs of a distinct enterprise. Otherwise, there would have been little point in making illegal hiring a predicate RICO offense.[131]

Moreover, Mohawk's arguments ignore the additional racketeering conduct alleged in this case. For example, in addition to direct hiring, respondents allege that Mohawk "borrows" and harbors the employees of other members of the enterprise.[132] The complaint further alleges that Mohawk conceals the enterprise's illegal activity by destroying employment documents and helping undocumented workers evade detection during government raids. Despite the broad sweep of Mohawk's tautological defense, it is far more difficult to characterize this conduct as merely Mohawk's affairs.[133]

C. Mohawk's Additional Distinctness Requirements Cannot Be Reconciled With the Statute or *Turkette*.

Mohawk's proposed restriction on association-in-fact enterprises is flatly inconsistent with § 1961(4), which, as explained above, defines that concept to encompass ***any***

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[131] Section 1962(c) is by far the most popular RICO provision for prosecutors and civil plaintiffs alike. *See, e.g.*, J. Rakoff & H. Goldstein, *RICO: Civil and Criminal Law and Strategy* § 1.06[3] (2005).

[132] JA 23 (Compl. ¶ 76).

[133] *See, e.g., Chen v. Mayflower Transit, Inc.*, 315 F. Supp.2d 886, 906 (N.D. Ill. 2004) (denying summary judgment on a similar argument because the evidence demonstrated that the defendant conducted and delegated activities that surpassed its own affairs).

association of persons and entities as long as they are associated in fact.[134] By limiting association-in-fact enterprises to some subset that satisfies Mohawk's murky additional qualifications, Mohawk's proposal would impose artificial restrictions on the full range of "associations embraced by the definition."[135] Nor can Mohawk's proposal be reconciled with *Kushner*'s interpretation of § 1962(c) to require nothing more than legal separateness between the defendant and the enterprise.[136]

1. Mohawk's Test For Distinctness Contradicts *Turkette*.

Moreover, Mohawk's proposal contradicts *Turkette*, which sets forth the requirements for pleading and proving association-in-fact enterprises, and holds that members of an association-in-fact enterprise must "associate [] together ***for a common purpose*** of engaging in a course of conduct."[137] The lower courts have applied that requirement faithfully and without apparent difficulty. According to Mohawk, however, an association for a common purpose will not suffice if it coincides with the individual purpose of any member of the enterprise. Indeed, by suggesting that an identity of purpose negates the distinctness necessary to form an enterprise as a matter of law, Mohawk's test actually converts *Turkette's* required proof of a

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[134] *See* 18 U.S.C. § 1961(4); *see also supra* Part II.

[135] *Turkette*, 452 U.S. at 580. Indeed, Mohawk's argument that Congress cannot have intended to subject "legitimate corporations" and their "natural business allies" to RICO liability merely recycles the argument rejected in *Turkette* and *Sedima*.

[136] *See supra* Part III (A).

[137] *Turkette*, 452 U.S. at 583.

common purpose to an absolute defense to RICO liability by rendering the members of the enterprise indistinct. Mohawk's approach, therefore, would upend twenty-five years of settled law and force the lower courts to discern whether the interests and affairs of the individual members of the enterprise are (1) common enough to satisfy *Turkette*, but (2) not so common that they destroy Mohawk's heightened distinctness requirement between the defendant and the enterprise. It is difficult to see how prosecutors or plaintiffs would be able to navigate any racketeer through these shoals. But the "razor thin zone" of RICO liability that would survive Mohawk's articulated test cannot be reconciled with Congress's expansive language and the express "admonition that RICO is to 'be liberally construed to effect its remedial purposes.' "[138]

2. Mohawk's Proposals Find No Support in the Cases That Reject Enterprises Consisting of a Corporation and its Employees or Subsidiaries: *Copperweld* Does Not Apply to RICO.

The only support Mohawk offers for its invitation for the Court to ignore the relevant statutory text, contradict Congress's intent and overturn its own RICO precedents, is a line of cases rejecting attempts to plead an association-in-fact enterprise comprised of (1) the corporation and all its employees; or (2) a corporation and its wholly-owned subsidiaries.[139] The short answer to these cases is that the association alleged here is not so limited.[140] Respondents'

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[138] *Jaguar Cars*, 46 F.3d at 267.

[139] *See* Mhk Br. at 30-32.

[140] *See supra* Part III (A)(2).

complaint makes no claim that the individual recruiters are Mohawk employees or that TPS and the other third party recruiting firms with whom Mohawk associates are within Mohawk's corporate family. Accordingly, as in *Kushner*, these cases are distinguishable on their facts.[141]

Furthermore, it is entirely unclear whether Mohawk's collection of pre-*Kushner* decisions can be reconciled with this Court's holding that nothing more than legal distinctness between a corporation and its only employee is required to satisfy § 1962(c). Although *Kushner* declined to consider the merits of these cases, the Court's holding has significant implications for their continued vitality.[142] If, as in *Kushner*, the sole employee and president of a corporation is distinct from the corporation/enterprise, the corporation is similarly distinct from its employees and its separately incorporated subsidiaries.

Moreover, *Kushner* takes direct aim at the basic reasoning of Mohawk's cases. The cases rejecting enterprises that consist of a corporation and its subsidiaries trace their reasoning to *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), where the Court rejected an "intracorporate conspiracy" offered to state a Sherman Act § 1 claim.[143] The circuit courts had been divided over

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[141] *See Kushner*, 533 U.S. at 164.

[142] *Id.*

[143] *See, e.g., Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003) ("A parent and its wholly owned subsidiaries no more have sufficient distinctiveness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act" citing *Copperweld*, despite its prior disapproval in the RICO context by *Kushner* and *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989)); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (citing *Copperweld*); *Bachman v. Bear Stearns & Co.*, 178 F.3d 930 (7th

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Copperweld's implications for RICO enterprises,[144] but in *Kushner*, this Court held that the economic considerations that justified the *Copperweld* rule in the antitrust context had no bearing on the entirely different enterprise considerations at issue in § 1962(c).[145]

By the same token, the cases that refuse to distinguish between a corporation and its employees typically turn on the observation that corporations can act only through employees and officers.[146] Alternatively, these decisions attempt to distinguish between employees acting within the scope of their corporate authority and those who exceed that authority.[147] *Kushner* rejected both of

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Cir. 1999) (citing *Fitzgerald*). *Cf. Brannon v. Boatmen's First Nat'l Bank*, 153 F.3d 1144, 1147 (10th Cir. 1998) ("[a] parent corporation, as a matter of corporate reality, is nothing more than the controlling shareholder of a subsidiary"); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 898 (8th Cir. 1999) (relying upon *Copperweld* in RICO analysis).

[144] *Compare Ashland Oil*, 875 F.2d at 1281 (rejecting the intracorporate conspiracy doctrine in the RICO context) *and Webster v. Omnitron Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (same) *with Bucklew*, 329 F.3d at 924 *and Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 898-99 (8th Cir. 1999).

[145] *Kushner*, 533 U.S. at 166 (*Copperweld* "doctrine turns on specific antitrust objectives"). *Accord Kirwin v. Price Communications Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004) (following *Kushner's* rejection of *Copperweld*).

[146] *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("Because a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise"); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 300-01 (3rd Cir. 1991) ("[a] corporation must always act through its employees and agents"); *Gasoline Sales, Inc. v. Acro Oil*, 39 F.3d 70 (3rd Cir. 1990) (following the "*Brittingham* rationale"). In *Jaguar Cars*, 46 F.3d at 262-64 & n.3, the Third Circuit partially overruled *Brittingham*, *Gasoline Sales* and a number of additional similar circuit precedents in light of *Reves* and *Sedima*.

[147] *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 219 F.3d 115, 117 (2d Cir. 2000) (citing *Riverwoods* and *Discon, Inc. v. NYNEX Corp.*,

(Continued on following page)

these theories as inconsistent with the RICO statute's text and its purposes.[148] To the extent, therefore, that Mohawk's arguments and the case law offered to support them are animated by any suggestion that the members of an enterprise must be separate economic actors or that they must be capable of deviating from an authorized corporate mission, *Kushner* has disposed of those concerns.

Recognizing the inconsistency between the reasoning of these cases and this Court's subsequent decision in *Kushner*, Mohawk now reads these cases to cohere around the alternative principle that a corporation and third parties who combine for the purpose of performing the corporation's own "functions or activities" cannot form a distinct enterprise as a matter of law. The opinions actually delivered in these cases set forth no such rule.[149] But even if *Riverwoods* and its progeny could be retro-fitted to avoid *Kushner*, the results in those cases are difficult to reconcile with a statute that requires nothing more than formal distinctness to separate the RICO defendant and the enterprise.[150] As Judge Posner frankly acknowledged in *Fitzgerald v. Chrysler Corp.*, a case cited by Mohawk and its *amici*, the exclusion of

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93 F.3d 1055 (2d Cir. 1996), *rev'd*, 525 U.S. 128 (1998), in support of a "scope of authority" test, *rev'd*, 533 U.S. 158 (2001)); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 449 (1st Cir. 2000) (employees and subsidiary were not distinct from the corporation absent an allegation that they exercised independent action or deviated from the scope of their corporate authority); *Parker & Parsley Petr. Co. v. Dresser*, 972 F.2d 580, 583 nn.2-3 (5th Cir. 1992); *Board of County Comm'rs v. Liberty Group*, 965 F.2d 879, 886 (10th Cir. 1992).

[148] *Kushner*, 533 U.S. at 166-67.

[149] *See, e.g.*, Mhk Br. at 31 ("***Stated differently***, [*Riverwoods* holds that] a corporation does not conduct the affairs of some other enterprise when it acts through its employees") (emphasis added).

[150] *See Kushner*, 533 U.S. at 163.

enterprises made up of different members of the same corporate family "doesn't emerge from the statutory language" but instead extends from a desire to impose limitations on the statute.[151] The Court rejected that approach to interpreting RICO more than twenty years ago.[152] In any event, the Court need not resolve the continued viability of *Riverwoods*, *Discon* and *Fitzgerald* to decide this case because the respondents here allege that Mohawk conducted the affairs of a larger, unlawful enterprise.

3. *Baker v. IBP, Inc.* Was Wrongly Decided.

The sole authority that can be read to support Mohawk's approach is the Seventh Circuit's unprecedented decision in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 543 U.S. 959 (2004), which dismissed a complaint that alleged a similar enterprise comprised of the defendant corporation and independent recruiters. *Baker* well illustrates the conflict between Mohawk's amorphous test and this Court's precedents. For example, *Baker's* enterprise discussion begins by citing a Seventh Circuit case that continued to apply *Copperweld* to RICO despite this Court's contrary admonition in *Kushner*, a decision the *Baker* court never addressed.[153] Applying *Copperweld*-Sherman Act analysis, the Court concluded IBP and the recruiters could

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[151] 116 F.3d at 226.

[152] *Sedima*, 473 U.S. at 499 ("The fact that [RICO] is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.")

[153] *See Baker*, 357 F.3d at 691 (citing *Bucklew*, 329 F.3d at 934). *Compare Kushner*, 533 U.S. at 166; *Ashland*, 875 F.2d at 1281 (a prior Seventh Circuit precedent that similarly abdjured the *Copperweld* doctrine in RICO cases).

not associate because they had "divergent goals."[154] Thus, the *Turkette* common purpose analysis focused not on the purpose of committing the racketeering activity, which the Court acknowledged, but on the members' other activities, which are irrelevant to RICO. However, the Court went on to reach the opposite conclusion, that the affairs of the enterprise were ***too intertwined*** with the defendant's affairs: "The nub of the complaint is that [the defendant corporation] operates ***itself*** unlawfully."[155] *Baker* never explained precisely how much commonality the plaintiffs would have to plead to (1) satisfy *Turkette*'s common purpose requirement but (2) avoid the conclusion that the enterprise's affairs were no different from the defendant corporation's affairs. Nor did the panel address the extensive authority that holds a member of an association-in-fact enterprise participates in the affairs of that enterprise by delegating racketeering activity to other members of the enterprise[156] Those precedents answer *Baker*'s question "how is it that [the defendant] operates or manages that enterprise through a pattern of racketeering activity?"[157]

Baker cites no authority for its contrary holdings and makes no attempt to reconcile its decision with this Court's precedents in *Reves*, *Turkette* and *Kushner*. Like Mohawk's brief, *Baker* fails to articulate a specific rule or principle that this or any other court could apply in any certain or predictable way. And although Mohawk cited the split of authority *Baker* created as the reason this Court should grant *certiorari*, Mohawk's opening brief

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[154] *Id.* at 691.

[155] *Id.* at 691-92.

[156] *See infra* Part III (B)(2)(b).

[157] *Baker*, 357 F.3d at 691.

makes no attempt to defend the Seventh Circuit's decision. The case is wrongly decided, and it cannot support a wholesale revision of RICO's broad statutory language.

CONCLUSION

Mohawk's opening brief asks this Court to re-draft the RICO statute. In support of this wholly illegitimate endeavor, Mohawk leads with an argument that cannot be found in its petition for *certiorari* and that Mohawk expressly conceded below. Mohawk then turns to arguments that have no textual support and would contradict decades of this Court's precedents. Congress intended to authorize RICO prosecutions and treble damage suits like this one to enforce the Nation's laws against alien smuggling and hiring undocumented aliens. This Court should defer to that legislative judgment, affirm the Eleventh Circuit's decision and allow respondents to pursue their claims on the merits.

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Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONERS

Petitioner's opening brief explained that the ruling below would transform a multitude of business disputes and ordinary conspiracies into federal RICO cases. The briefs of both respondents and the United States sweepingly confirm this. Indeed, on the Government's view of an "enterprise," it is difficult to conceive of an alleged conspiracy that would not fall within RICO's scope.

RICO, broad as it may be, is not that unbounded. Instead, RICO is aimed at the misuse of a distinct "enterprise." Indeed, the statutory limitations make plain that only individuals—not an ad-hoc grouping of a corporation and others—can form an association-in-fact enterprise. At the very least, a corporation's hiring and compensating of its own employees are the affairs of the corporation itself, not those of a separate new enterprise that is distinct from the corporation.

In the end, the Government's position rests on its view that the interpretation of RICO must be stretched beyond its language and purposes, otherwise some corporation might avoid liability and benefit from unlawful conduct. The Government, however, cannot cite a single example of this. The cases cited by the Government could easily be repled to comply with RICO's requirements. Moreover, corporations remain subject to both RICO liability and general criminal liability for predicate-act felonies committed by employees. The Government, as experience has proven, has ample tools flowing from a felony conviction to penalize the corporation and force the disgorgement of any ill-gotten proceeds.

I. RICO DOES NOT PERMIT A CORPORATION TO BE A MEMBER OF AN ASSOCIATION-IN-FACT ENTERPRISE.

As Mohawk explained in its opening brief, § 1961(4) expressly requires that an "association-in-fact enterprise"

consist of a "group of *individuals* associated in fact."[1] 18 U.S.C. § 1961(4) (emphasis added). See Pet. Br. 12-26. Neither the respondents nor the United States contend that corporations are "individuals" within the meaning of the statute. See U.S. Br. 6.

Rather, respondents and the United States argue that this Court should ignore the plain language of § 1961(4). According to them, the Court essentially should rewrite the definition of "enterprise" to read "any person or group." That is not, however, what the statute says.

A. RICO Consistently Uses "Includes" To Introduce Comprehensive Definitions.

Respondents' argument depends upon interpreting "includes" in § 1961(4) as illustrative, rather than comprehensive. In pressing for an illustrative interpretation, however, both respondents and the United States completely ignore the meaning of "includes" as it is used to introduce *three* other definitions in § 1961. The word "includes" introduces the definitions of "person," "documentary material," and "Attorney General." 18 U.S.C. § 1961(3), (9), (10). In each of these other subsections, "includes" plainly has a comprehensive—not an illustrative—meaning. See Pet. Br. 17-18. Indeed, neither respondents nor the United States

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[1] Respondents—but not the United States—claim that this Court may not consider this specific argument because petitioner did not raise it below. Resp. Br. 12-14. But Mohawk consistently has contested the legal sufficiency of respondents' alleged "enterprise," an issue squarely raised by the Question Presented—"[w]hether a defendant corporation and its agents can constitute an 'enterprise' under [RICO]." "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

makes any effort to show that the use of "includes" in these other definitions is illustrative and not comprehensive.[2]

Moreover, one other RICO provision uses the term "includes" to introduce a definition, and it also uses that term in its comprehensive sense. Section 1963(b) provides that "[p]roperty subject to criminal forfeiture ... *includes* (1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 18 U.S.C. § 1963(b) (emphasis added). This Court already has held that such a definition of property is comprehensive. In reviewing the identical definition in 21 U.S.C. § 853(b), which is also introduced by "includes," this Court held that it was an "all-inclusive listing." *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989). As in § 1963(b), Congress used "includes" in § 1961 to introduce "all-inclusive" definitions, not lists of illustrations.

RICO itself expresses an understanding that "includes" was used comprehensively when it introduced detailed lists. In fact, when Congress used a form of "include" to introduce a

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[2] Respondents' only response is to implausibly assert that "any definitions that begin with 'includes' must be read as exemplary rather than comprehensive." Resp. Br. 21. In fact, the only suggestion that any of these definitions in § 1961 *might* not be comprehensive comes from an *amicus* which, drawing from admiralty law, queries whether an object like a ship might be a RICO "person." *See* NASCAT Br. 17-18 n.40. But the "ancient admiralty fiction" of treating vessels as "persons" to permit an *in rem* proceeding is just that: a fiction, both archaic and peculiar to admiralty, that was indulged "to allow actions against ships where a person owning the ship could not be reached." *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 22-23 (1960). *See Reed* v. *S. S. Yaka*, 373 U.S. 410, 419 n.2 (1963) (Harlan, J., dissenting) (personalty of a ship is "a fiction whose principal modern function is as a procedural device to provide a convenient forum where none would otherwise be available"). That fiction does not extend to RICO, whose criterion for "person" — that it be "capable of holding a legal or beneficial interest in property" — is not met by ships.

detailed list but meant that list to be illustrative, Congress followed the term "including" with the phrase "but not limited to." See 18 U.S.C. § 1964(a) (twice using phrase); see also 18 U.S.C. § 1963(b) (1970) (using same phrase), *added by* Pub. L. No. 91-452, § 901, 84 Stat. 922, 943 (1970), *removed by* Pub. L. No. 98-473, § 302, 98 Stat. 1837, 2040 (1984). The United States suggests that in using this language Congress decided to "tak[e] a belt-and-suspenders approach." U.S. Br. 8 n.1. But the Government's "belt-and-suspenders" interpretation is merely window dressing for its real argument: the Court should ignore the words "but not limited to" as superfluous, contrary to a "cardinal principle of statutory construction." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). The better interpretation is that this phrase, which indicates the term is being used illustratively, reveals that the naked use of the term "includes" is comprehensive in § 1961.

Like the other definitions in §§ 1961 and 1963(b), the definition of "enterprise" in § 1961(4) also uses "includes" in its comprehensive sense. Neither respondents nor any other party offers any rational explanation why the identical word "includes" should be interpreted in different ways in the same statute. "Generally, identical words used in different parts of the same statute are ... presumed to have the same meaning." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, No. 04-1371, slip. op. at 8 (U.S. Mar. 21, 2006) (internal quotation marks omitted) (omission in original).

Congress used language in § 1961(4) that was extremely specific about the types of entities that could constitute RICO enterprises. Where Congress wanted to ensure that the definition captured particular entities, it did so by employing broad catch-all language. Thus, the definition of enterprise in § 1961(4) begins with a list of legal entities and ends with the phrase "or other legal entity." By contrast, Congress did not follow the specific words at issue here—any "group of individuals associated in fact although not a legal entity"—

with the phrase "or any other group." This omission was no accident; it shows a clear intent to limit association-in-fact enterprises to groups of *individuals*, rather than groups of legal entities.

The language of § 1961(4) would make little sense if Congress meant "enterprise" limitlessly to encompass both any "legal entity" (as the statute says) and any ad hoc association (as the statute omits). But it is perfectly comprehensible if Congress's intent was only to reach (1) the corruption of any legal entity and (2) groups of individuals organized in criminal gangs. Indeed, the United States concedes that the purpose of including associations in fact was "to ensure that organized-crime syndicates are treated as covered 'enterprises.'" U.S. Br. 10 n.2. In short, § 1961(4) contains precisely the type of definition that Judge Friendly spoke about on the eve of RICO's passage—one that uses "includes" to set forth a comprehensive list. See *Willheim* v. *Murchison*, 342 F.2d 33, 41-42 (2d Cir. 1965).

B. Respondents And The United States Seek To Redraft The Definition Of "Enterprise."

The failure of respondents and the United States to dispute that "includes" has a comprehensive meaning in three other subsections of § 1961 completely undermines their other arguments. Respondents and the United States contend that, because the words "includes" and "means" are both used in § 1961, the two must have different meanings. See U.S. Br. 7-8; Resp. Br. 20-21. But that theory is flatly inconsistent with the other comprehensive uses of "includes" in § 1961's definitions of "person," "documentary material," and "Attorney General." 18 U.S.C. § 1961(3), (9), (10).

The cases relied upon by respondents and their *amici* are also inapposite. Those cases recognize that a statute's alternating use of the term "means" and the term "includes"

can signify that the two terms were "used synonymously."[3] *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). The United States expressly recognizes that "'the term 'includes' may sometimes be taken as synonymous with 'means,' and thus as introducing a comprehensive list.'" U.S. Br. 7 (quoting *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 (1934)). Thus, contrary to respondents' contention, there is no "rule" on interpreting the term "includes" when the statute also uses the term "means." Rather, to determine the meaning of "includes," a statute must be analyzed "as a whole." *Marotta*, 287 U.S. at 517 (reviewing some of the 20 provisions that used "shall include" and comparing them to 11 provisions that used "shall mean"). None of the cases cited in support of respondents' position involved—like § 1961(4)—nearby subsections that employed "includes" in an unquestionably comprehensive fashion.[4]

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[3] "Congress, needless to say, is permitted to use synonyms in a statute." *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001).

[4] The cases cited by respondents and the United States are also inapposite for additional reasons. *First*, some cases interpret different, clearly exemplary phrasings of the term "includes." *See Chevron U.S.A., Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002) (interpreting "may include" as exemplary in light of its "expansive phrasing"). *Second*, others involve obviously incomplete listings. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188-89 (1941) ("including" phrase that introduced only one form of remedial action); *Marotta*, 287 U.S. at 517 ("persons shall include" introduced only women and corporations, but not men). *Third*, other cases hold that a form of "include" must be exemplary to avoid conflict with another provision of the statute. *See, e.g., Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (comprehensive interpretation would render statutory exceptions superfluous); *Groman* v. *Commissioner*, 302 U.S. 82, 86 (1937) (comprehensive interpretation inconsistent with statute's express definition of "'includes' and 'including'"). *Finally*, other cases placed relied upon other factors not present here. *See United States* v. *New York Tel. Co.*, 434 U.S. 159, 169-70 (1977) (interpreting "includes" as illustrative in light of a number of factors, including Congress's express statement that warrants for pen registers were "'permissible'").

It is thus silly for respondents to contend that Mohawk seeks "a judicial amendment to § 1961(4)." Resp. Br. 25. On the contrary, it is respondents who would have this Court delete the phrase "of individuals" from the definition of "enterprise," so that any "group associated in fact" could constitute an enterprise. Resp. Br. 18.

The United States similarly urges this Court to abandon the definition Congress enacted. The Government offers as substitutes any "de facto alliance," U.S. Br. 4, 5, 6, 11 n.3, 12, 13, 14, 15, 20, and any "collaborative venture," *id.* at 5. It thus urges this Court to give the term enterprise its "natura[l]" meaning. U.S. Br. 12. Congress, however, expressly defined "enterprise" and "statutory definitions of terms ... prevail over colloquial meanings." *Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490, 502 (1945). Indeed, this Court has already applied this well-settled principle to reject an invitation to interpret "enterprise" based upon that term's general meaning. See Pet. Br. 18-19 (discussing *NOW* v. *Scheidler*, 510 U.S. 249 (1994)).[5]

At bottom, both respondents and the United States argue that Congress *ought* to have provided for associations in fact consisting of corporations and other entities. The Government asserts that "[t]here is no sound reason" for Congress to have omitted corporations from "the sort of de facto alliance that would constitute a RICO 'enterprise' if it were formed solely by natural persons."[6] U.S. Br. 14. This is

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[5] Both respondents and the United States read out of context this Court's prior observation in *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), that "[t]here is no restriction upon the associations embraced by the definition" of enterprise. *See* Resp. Br. 14; U.S. Br. 11. *Turkette* rejected revising the express definition in § 1961(4) to impose a requirement that the enterprise be "legitimate," noting that "no restriction" of the kind was included in § 1961(4).

[6] The United States also contends that this Court should ignore the rule of lenity in light of the Congress' statement that it should be "liberally construed to effectuate its remedial purposes." *See* U.S. Br. 15 & n.5.

hardly a reason to ignore the statutory language. Moreover, Congress never found that ad hoc associations of corporations posed any threat that was not already adequately addressed by existing criminal and civil remedies. See Pet. Br. 20-26.[7] As set forth below in Section III, those laws are more than adequate to deal with the harms identified by the Government. Simply because Congress chose not to use a sledgehammer to respond to a nonexistent problem is hardly "absurd," as respondents assert. Resp. Br. 15.[8]

Accord Resp. Br. 14. But, as this Court has already pointed out in *Sedima*, the two canons can be reconciled and the liberal construction maxim should apply in the "remedial" context—that is, § 1964's civil enforcement provisions. By contrast, "1961 and 1962 can be strictly construed without adopting that approach to 1964(c)." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491-92 n.10 (1985). There is no reason for the Court to revisit its reconciliation of the two and thus the rule of lenity provides yet another reason for the Court to find the enterprise in this case legally insufficient.

[7] Indeed, the legislative history is overwhelming on this score. The United States cites out of context a Committee Report notation that § 1961(4) encompasses "any associative group." U.S. Br. 10. The cited section was making the simple point that § 1961(4) would not reach only "legally recognized associative entities," but would also extend to criminal gangs. S. Rep. No. 91-617, at 158 (1969). If Congress had intended "enterprise" to mean "any association in fact of legal entities," it would have written § 1961(4) that way. *See City of Chi. v. Environmental Def. Fund*, 511 U.S. 328, 337 (1994) ("it is the statute, and not the Committee Report, which is the authoritative expression of the law").

[8] Incredibly, respondents also attempt to fit their alleged enterprise within the term "union" in § 1961(4). *See* Resp. Br. 19. Section 1961(4)'s reference to "union" is a reference to labor union. This is made plain by § 1961(1), which also uses the term "union" to describe violations of 29 U.S.C. § 501(c)—a statute that applies only to embezzlement from "labor organization[s]." 29 U.S.C. § 501(c). And this interpretation of "union" comports with Congress's oft-stated intention to use RICO to address organized crime's "infiltrat[ing] and corrupt[ing] legitimate ... labor unions." Pub. L. No. 91-452, 84 Stat. 922, 923 (1970); *see also, e.g.*, S. Rep. No. 91-617, at 78 (noting that "organized crime has moved into legitimate unions"). The express inclusion of "union" in § 1961(4) after the list of legal entities may have been in recognition of

II. RESPONDENTS ALLEGE AN INJURY CAUSED BY MOHAWK'S CONDUCT OF ITS OWN AFFAIRS.

Even if a corporation could be a member of an association-in-fact enterprise, respondents' RICO claim would still fail because respondents allege harm flowing from the operation of *Mohawk itself*, not from the conduct of a distinct enterprise. Respondents claim that they are Mohawk employees to whom Mohawk pays an inadequate wage because Mohawk allegedly hires other (unauthorized) workers. Under *Reves* and *Cedric Kushner*, respondents cannot name Mohawk as both the RICO enterprise and the defendant. In an effort to avoid this fatal defect in this claim, respondents allege an association-in-fact enterprise consisting of Mohawk and recruiting contractors. This Court should reject respondents' attempt to plead around the restrictions set forth in *Reves* and *Cedric Kushner*. No matter how pled, respondents § 1962(c) claim fails because the alleged injuries flow strictly from the actions of Mohawk qua employer, not from the actions of some other distinct entity.

A. The United States Would Effectively Permit Every Conspiracy To Be A RICO Enterprise.

The United States is completely candid: it asserts that the requirements set forth in *Reves* and *Cedric Kushner* have no application to association-in-fact enterprises. Instead, according to the Government, an association-in-fact enterprise "*by its nature* implies that the group should be regarded for purposes of RICO as an entity distinct from any single member." U.S. Br. 28 (emphasis added). On the Government's view, only two requirements are necessary to plead a § 1962(c) violation involving an alleged association-

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the fact that, at the time of RICO's passage, it was not clear that labor unions were legal entities. *See, e.g., United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (holding unincorporated labor union not a citizen for purposes of diversity jurisdiction).

in-fact enterprise: "a shared purpose among the members and a continuing organizational presence." *Id.* at 21.

It would be a rare conspiracy, if any, that would not meet these requirements. The "shared purpose" requirement certainly will be met by every alleged conspiracy, for the conspirators share the purpose of carrying out their alleged agreement to commit crime. See U.S. Br. 22-23. And, on the Government's capacious view, every real conspiracy will also meet the "continuing organizational presence" requirement. Thus, the United States' interpretation effectively would turn every conspiracy into an association-in-fact RICO enterprise. That is why the United States cannot give an example where a relationship creates a conspiracy but does not create a RICO enterprise. See U.S. Br. 23 & n.10.

Indeed, on the Government's theory, it is difficult to imagine a business dispute that could not be pled as a § 1962(c) violation, provided that more than one company were involved in some fashion. As the Government makes plain, carrying out a business deal or contract would furnish the "shared purpose." And, so long as the business relationship was not completely ephemeral, the necessary "continuing organizational presence" would be found.[9]

This position—that RICO subsumes every business dispute in which a plaintiff can plead a "conspiracy"—cannot be reconciled with *Reves*. *Reves* mandates that a RICO defendant must be shown to have participated in the conduct

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[9] Respondents take an even broader position: a corporation is liable under § 1962(c) for wholly unilateral action because a corporation can form a distinct association-in-fact enterprise with its own employees or wholly-owned subsidiaries. *See* Resp. Br. 30-31 & n.103, 45-47. This rule, which would exclude all claims against corporations from the requirements set forth in *Reves* and *Cedric Kushner*, rightly has been and should be rejected. *See* Pet. Br. 31-33 (discussing rejection of association-in-fact enterprises consisting of corporations and their employees and of parent corporations and their subsidiaries); *id.* at 38-40 (explaining flaws in separate legal entity test).

of the affairs of a separate enterprise, not just the affairs of the RICO defendant itself. Under *Reves*, simply pleading the existence of a common purpose and continuing organizational structure with some third party is not enough. Instead of addressing this issue, the Government essentially ignores *Reves*, citing it just once in passing in the last paragraph of its brief. See U.S. Br. 29.

In *Reves*, a group of noteholders sued the note issuer's accounting firm under RICO, alleging the firm violated state and federal securities fraud laws. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 175 (1993). In an attempt to recover treble damages, the noteholders alleged that the issuer was the enterprise and that the accounting firm, as the RICO defendant, participated in the conduct of the issuer's affairs. See *id.* at 185-86. Although the noteholders prevailed on their claims for securities fraud, this Court rejected their RICO claim because the accounting firm's actions did not constitute participation in the conduct of the issuer's affairs. See *id.* at 176, 185-86.

Respondents and the United States ask this Court to treat *Reves* as a mere pleading error case. In their view, all the *Reves* plaintiffs had to do was allege an association-in-fact enterprise consisting of the accounting firm and the issuer or some other third party (such as the note issuer's former general partner or former accountant, both of whom were separately convicted of tax fraud and had relationships with the accounting firm, see *id.* at 173). But *Reves* is not merely a case about artful, or inartful, pleading. To the contrary, the central holding of *Reves* is that RICO liability turns on more than an allegation that a defendant committed two or more predicate acts; a RICO claim must allege harm directly flowing from the defendant's participation in the conduct of the affairs of some *separate* RICO enterprise.

The alleged injury in this case, however, stems directly from Mohawk's conduct of its own affairs. Respondents allege that Mohawk hired them and Mohawk paid them a

"depressed" wage because of "Mohawk's employment and harboring of illegal workers." JA 16-17 (Compl. ¶ 45). Respondents could have sued Mohawk employees or the recruiters for allegedly conducting the affairs of Mohawk (as the enterprise) in an unlawful manner. But *Cedric Kushner* prevented respondents from suing Mohawk and naming it as the RICO enterprise. In an effort to evade *Cedric Kushner* (and reach the deepest pockets), respondents have attempted to plead an "association in fact" between Mohawk and its contractors (the recruiters). But respondents' alleged injury remains one that flows from Mohawk's conduct of its own affairs—its hiring and compensation practices. Respondents should not be permitted to evade the requirements of *Reves* and *Cedric Kushner*.

B. Respondents Do Not Allege That Mohawk Conducted The Affairs Of A Distinct Enterprise.

After proposing limitless rules of their own, respondents and the United States assert that petitioner's position in Section II of its opening brief is itself limitless. See Resp. Br. 26 (asserting that "no corporation ... could be prosecuted as a member of an association-in-fact enterprise"); U.S. Br. 21 (claiming that "business entities engaged in 'arms-length dealings' can *never* combine to form a RICO associated-in-fact enterprise" (citation omitted)). This is wrong.

Petitioner simply seeks an application of the principles that this Court already set forth in *Reves* and *Cedric Kushner* to alleged association-in-fact enterprises assuming that they can include corporations. Those principles, rooted in RICO's text, require meaningful participation in the affairs of an enterprise distinct from the RICO defendant. In *Reves*, this Court held that an accounting firm's preparation of audit reports and its client's financial statements only constituted participation in the conduct of the accounting firm's own affairs, not those of its client. Likewise, here, the hiring and compensating of employees constitutes participation in the

employer's affairs, not those of a separate entity. *Cf. Faragher* v. *City of Boca Raton*, 524 U.S. 775, 790 (1998) (employer responsible for employment actions like "hiring, firing, promotion, compensation, and work assignment"). Respondents' association-in-fact allegations do not convert these corporate actions into the affairs of a distinct entity.

Likewise, in the other RICO case on the Court's docket this Term, *Anza* v. *Ideal Steel Supply Corp.* (No. 04-433), plaintiff alleged that it was injured by its competitor's filing of false tax statements. Plaintiff in that case brought, consistent with *Reves* and *Cedric Kushner*, a § 1962(c) claim against the individual wrongdoers (the two owner-operators of National Steel Supply, Inc.) and pled National Steel as the distinct RICO enterprise. The *Anza* plaintiff, however, could not (and did not) sue National Steel itself under § 1962(c) and claim that National Steel's filing of its own corporate taxes constituted participation in the conduct of some distinct association-in-fact enterprise. Otherwise, the limitations set forth in *Reves* and *Cedric Kushner* would be meaningless.[10]

Contrary to respondents' assertions, the rule proposed by Mohawk would permit a corporation to be held liable under § 1962(c) when it participated in the conduct of the affairs of a distinct enterprise. Thus, for example, Mohawk could violate RICO if it sought unlawfully to direct the affairs of the recruiting firms in this case (which respondents do not and cannot allege). In addition, a corporation that formed an association with another company to engage unlawfully in a

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[10] The issue of proximate causation presented in *Anza* is also relevant to this case. As in *Anza*, respondents here allege that Mohawk committed immigration fraud and, as an indirect result, caused their wages to be depressed. If this Court reverses or vacates in *Anza*, but does not decide to reverse in this case on the question presented, petitioner respectfully requests that this Court vacate and remand this case to the Eleventh Circuit in light of its decision in *Anza*. *See* 18 U.S.C. § 1964(c) (setting forth direct injury as a standing requirement, which as a jurisdictional requirement this Court always has the power to address).

truly distinct enterprise could violate § 1962(c). For instance, a baked goods manufacturer that forms with third parties a drug distribution enterprise would satisfy the distinctness requirement. Similarly, a law firm that agrees with others to operate an illegal gambling ring also would satisfy the distinctness requirement. In sum, a corporation could satisfy § 1962(c)'s distinctness requirement where it either operates another legal entity or joins with other entities to engage in a new—and thus distinct—business activity. Mohawk's hiring and compensating of its own carpet manufacturing employees, however, cannot be the activity of a distinct enterprise.

Indeed, to hold otherwise would permit the most routine business disputes and tort claims to be pled as § 1962(c) association-in-fact enterprise claims. See generally C.J. Rehnquist, *Reforming RICO, in The RICO Racket* 63, 65 (G. McDowell ed., 1989) ("Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorneys' fees ...."). The briefs for the United States and respondents demonstrate how readily such claims could be asserted if their theories were adopted. In fact, the Eleventh Circuit below conceded that it "has never required anything other than a 'loose or informal' association of distinct entities" to establish an association-in-fact enterprise. Pet. App. 7a (two entities allegedly "engaged in a conspiracy" is all that is required to establish an association in fact).

At a minimum, this Court should reject the view of the Eleventh Circuit and the United States that any "loose or informal" association for a common purpose—*i.e.*, a conspiracy—also constitutes a RICO enterprise. Participating in the conduct of a distinct "enterprise" clearly suggests something different than joining a conspiracy.[11] It should

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[11] RICO is an enterprise statute, not a conspiracy statute. Its substantive violations are based upon victimizing or conducting the affairs of a

require the operation or management of a truly separate entity. Moreover, the existence of such a distinct entity, or "enterprise," should be based upon something more than a series of arms-length business contracts between a corporation and numerous independent contractors who provide services for a period of time and then are replaced by successive contractors offering better services or more favorable terms. That is particularly true where, as here, these business relationships seek to do nothing more than further the corporate affairs of the RICO defendant. Absent the conclusion that every conspiracy can constitute a RICO enterprise, the allegations regarding Mohawk's hiring and compensation practices fall far short of satisfying the enterprise requirement.

III. RECOGNIZING RICO'S LIMITATIONS WOULD NOT HINDER CRIMINAL ENFORCEMENT.

The Government also raises two law enforcement objections to the interpretation of § 1961(4) that petitioner set forth in Section I of its opening brief: (a) many alleged enterprises are association-in-fact enterprises that include corporations, and (b) bringing RICO suits against individuals would permit corporations to retain the proceeds of unlawful

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distinct enterprise: RICO did not create an offense of participating (through a pattern of racketeering) in a conspiracy. *See* 18 U.S.C. § 1964(a)-(c). Section 1961(4) requires that "the enterprise [be] an entity." *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). Such a requirement connotes an enduring venture that has an existence and affairs separate and apart those that participate in it. If RICO required nothing more than a "loose and informal" association to satisfy the enterprise requirement, Congress certainly knew how to say that without employing the terminology used in RICO. *See, e.g.*, 18 U.S.C. § 371. Congress did not even use terms that invoke conspiracy concepts, such as "common plan and scheme," "acting in concert," or even "joint" activities. Indeed, RICO's own conspiracy provision (§ 1962(d)) prohibits only conspiracies to victimize or misuse enterprises, strongly suggesting that enterprises must something different than conspiracies themselves.

activity. See U.S. Br. 16-20. Neither of these objections withstands scrutiny.

A. Most Association-In-Fact Enterprises Simply Could Be Repled.

The United States notes that a single individual often unlawfully conducts the affairs of multiple companies through a pattern of racketeering. See U.S. Br. 16. In these cases, the Government sometimes charged one association-in-fact enterprise consisting of all of those companies (and sometimes the individual defendants as well). The Government implies that it would not be able to bring RICO prosecutions in such cases unless it can plead an association-in-fact enterprise that consists of corporations. An examination of the cases cited by the Government, however, reveals that it could still have prosecuted the misconduct under RICO by repleading the enterprise. In some of these cases, the Government could have charged multiple violations of RICO, naming each corporation as a separate enterprise. Indeed, the cases cited by the Government explicitly make this very point.[12] In other cases, the Government could have charged an association in fact consisting solely of individuals.[13] None of the positions advanced by petitioner would prohibit such repleading.

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[12] *See United States* v. *Feldman*, 853 F.2d 648, 655 (9th Cir. 1988) (cited in U.S. Br. 16 & 17 n.8) (explaining that, in face of association-in-fact enterprise encompassing seven corporations, "[e]ach individual corporation is in itself a legal entity and, alone, may be charged as the RICO enterprise"); *United States* v. *Stolfi*, 889 F.2d 378, 380 (2d Cir. 1989) (cited in U.S. Br. 18 n.9) (noting that two legal entities "may often have functioned as separate and distinct organizations and may have been capable of being separate enterprises for RICO purposes").

[13] For instance, *United States* v. *Goldin Industries, Inc.* involved a father and three sons using three scrap metal businesses controlled by the family to defraud customers. 219 F.3d 1271, 1273 (11th Cir. 2000) (cited in U.S. Br. 16 and Resp. Br. 38). Although the Government alleged an enterprise consisting of both individuals and the corporations, the

Apparently anticipating that petitioner would explain that these RICO cases could be repled, the Government raises a second objection: "it may be difficult ... to prove the requisite 'pattern of racketeering activity' with respect to any *single* corporation." U.S. Br. 18. The Government then explains that some individual may engage in repeated criminal acts, but would be careful not to engage in more than one act per corporation. The Government can offer only one purported example: *United States* v. *Butler*, 954 F.2d 114 (2d Cir. 1992) (cited in U.S. Br. 18 n.9). But *Butler* itself does not even match the far-fetched fact pattern the Government imagines. In *Butler*, the Government indicted an individual committing numerous acts of fraud on and embezzlement from two separate unions (one based in New York and the other in Florida) and making numerous false statements related to four different pension plans. See *id.* at 118-20. Although the court affirmed the Government's alleged omnibus association-in-fact enterprise consisting of all the entities combined, each of these entities could have been pled as a separate enterprise in light of the repeated frauds and false statements related to each. See *id.*

B. The Government Has Ample Avenues To Disgorge Criminal Proceeds.

Finally, the Government claims that using § 1962(c) of RICO to prosecute "the blameworthy corporate officers ... would not enable the Government to obtain forfeiture of ... profits the corporation may have realized." U.S. Br. 19. The Government, however, ignores the many means by which it can force a corporation to disgorge such criminal proceeds.

As petitioners previously noted (Pet. Br. 41-42), the Government may be able to pursue corporate wrongdoers

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Government could have alleged an enterprise of the four individuals associated in fact. *See also United States* v. *Perkins*, 596 F. Supp. 528 (E.D. Pa. 1984) (cited in U.S. Br. 17 n.8) (enterprise could have been association-in-fact of three individuals).

under § 1962(a) and (b) of RICO. Even outside of RICO, the Government can still obtain ample remedies against a corporation that ensure that the corporation does not benefit from criminal activity. Because "[a] corporation may be convicted for the criminal acts of its agents, under a theory of respondeat superior," a corporation can be criminally liable for underlying predicate offenses committed by its officers, directors, and employees. *United States* v. *Cincotta*, 689 F.2d 238, 241 (1st Cir. 1981). Once the Government obtains convictions for those offenses, it has numerous tools at its disposal, including fines, forfeiture, and restitution. *Any* corporation convicted of *any* felony is subject to a significant criminal fine: either $500,000 per felony or, alternatively, the greater of "*twice* the gross gain [that the defendant realizes from the offense] or *twice* the gross loss [that the offense causes]." 18 U.S.C. § 3571(c)(3), (d) (emphasis added).[14]

In addition, many felony criminal convictions (including convictions for many of the crimes that are RICO predicate offenses) require the sentencing court to order criminal forfeiture of the gross proceeds of the offense and other property used in the commission of the offense.[15] See, *e.g.*, 18 U.S.C. § 982. The Government also may seek civil forfeiture of any property that "constitutes or is derived from proceeds traceable to a violation" of a number of crimes,

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[14] Such an alternative fine can be substantial. For instance, in the Government's unsuccessful prosecution of Tyson Foods, Inc. for allegedly hiring illegal workers, the prosecutors "calculated Tyson's financial exposure at $139 million." S. Kilman, *Tyson Alien-Smuggling Trial Promises to Prove a Landmark*, Wall St. J. A2 (Feb. 3, 2003).

[15] For example, conviction on any of the immigration offenses that respondents have alleged would require forfeiture of "any property real or personal" obtained from the crime, "any conveyance used," and "any property ... that is used to facilitate" the crime. 18 U.S.C. § 982(a)(6)(A). And a conviction of the methamphetamine-producing pharmaceutical company that the Government hypothesizes would require the criminal forfeiture of any proceeds of the crime and all of the property used in the crime. *See* 21 U.S.C. § 853(a); *see also id.* § 881 (civil forfeiture).

including all but one of the crimes that are listed as RICO predicate acts in § 1961(1). 18 U.S.C. § 981(a)(1)(C) (allowing civil forfeiture for any offense constituting "specified unlawful activity" under § 1956(c)(7)); see *id.* § 1956(c)(7) (defining "specified unlawful activity" to include all but one of the offenses listed in § 1961(1)).[16]

In sum, even apart from RICO, the United States has a full arsenal at its disposal to force corporations to disgorge any ill-gotten gains. The strength of these available remedies helps explain why the Government has not relied on RICO in recent high-profile corporate fraud cases, including the Enron, WorldCom, and HealthSouth prosecutions.[17] In fact, none of the 170 charging documents on the website of the President's Corporate Fraud Task Force alleges a single RICO count.[18] There is simply no need to convert RICO into a corporate catch-all civil liability statute to ensure effective criminal law enforcement.

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[16] Without citation or explanation, the Government also asserts that it may not be able "to obtain effective relief in cases involving the corruption of labor unions." U.S. Br. 20. The Government can prosecute the unions themselves under RICO if such unions participated in the conduct of the affairs of the "benefit plans" or other "legal entities" the Government mentions. Aside from RICO, the Government also has at its disposal all of the other prosecutorial tools and remedies. In addition, respondents point to a loan-sharking ring in which the individuals constitute an association in fact and suggest that such a claim would fail on petitioner's theory. *See* Resp. Br. 35-36. But none of petitioner's contentions applies to an association-in-fact comprised of individuals.

[17] *See* Superseding Indictment, *United States* v. *Ebbers*, No. 1:02 Cr. 1144 (S.D.N.Y. Sept. 15, 2004); Superseding Indictment, *United States* v. *Lay*, Cr. No. 4:04-cr-00025-3 (S.D. Tex. July 7, 2004); Indictment, *United States* v. *Scrushy*, No. 2:03-cr-00530-KOB (N.D. Ala. Oct. 29, 2003).

[18] U.S. Dep't of Justice, President's Corporate Fraud Task Force: Significant Criminal Cases & Charging Documents, *at* http://www.usdoj.gov/dag/cftf/cases.htm (visited Apr. 10, 2006).

IV. RESPONDENTS' IMMIGRATION LAW ARGUMENTS ARE MISPLACED.

Respondents together with their *amici* (but not the United States) contend that despite RICO's requirements, this suit should be permitted because Congress added violations of 8 U.S.C. § 1324, including the felony hiring of illegal aliens, to RICO's list of predicate acts.[19] This addition, however, did not dispense with RICO's other requirements. In fact, in the routine case where a single employer unilaterally recruits and hires illegal aliens, a RICO suit cannot be brought against the employer because it is not distinct from the enterprise. Likewise, here, for the reasons set forth above, respondents have not pled a claim that complies with RICO's requirements.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

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[19] Much of respondents' argument is built upon their misunderstanding of the enactment of the relevant laws. Respondents claim that Congress added the felony hiring provision to 8 U.S.C. § 1324 and *then* made § 1324 a RICO predicate act. *See* Resp. Br. 8-11. *Accord* NASCAT Br. 1-2; *cf.* ImmPAC. Br. 2. In fact, respondents and their amici get the order of these actions backwards: § 1324 was added as a RICO predicate act before Congress made the hiring of illegal aliens a felony. *See* Antiterrorism and Effective Death Penalty Act, § 433, Pub. L. No. 104-132, 110 Stat. 1214, 1274 (Apr. 24, 1996) (adding 8 U.S.C. § 1324 as RICO predicate); Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 203(b)(4), 110 Stat. 3009-546, 3009-566 (Sept. 30, 1996) (adding felony hiring provision to § 1324). The legislative history of this amendment to RICO suggests that Congress acted to "combat alien smuggling organizations." H.R. Rep. No. 104-22, at 6. *See also, e.g.*, 139 Cong. Rec. S9923 (daily ed. July 30, 1993) (remarks of Sen. Simpson) (stating that "I support using [RICO] to prosecute organized smuggling gangs").

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Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–465

MOHAWK INDUSTRIES, INC., PETITIONER *v.* SHIRLEY WILLIAMS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 5, 2006]

PER CURIAM.

The writ of certiorari limited to Question 1 presented by the petition, granted at 546 U. S. ___ (2005), is dismissed as improvidently granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Anza* v. *Ideal Steel Supply Corp., ante,* p. ___.

It is so ordered.

Per Curiam

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